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No. 95-1898

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction in this case because the State's petition for rehearing in the Court of Appeals was untimely, and therefore did not toll the statutory 90-day period for filing a petition for writ of certiorari?[1]

2. Whether, consistent with the Due Process Clause and *Morrissey v. Brewer*, 408 U.S. 471 (1972), a State may return to prison without a hearing, "for any reason or no reason," a person who was conditionally released to the community in a program that, under *Morrissey*, differs from parole in name only, and who, the State concedes, abided by all the conditions of his release?

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[1] Mr. Harper, who appeared *pro se* until the appointment of undersigned counsel after this Court granted certiorari, did not argue the jurisdictional issue in his Brief in Opposition to Petition for Writ of Certiorari. Mr. Harper did point out that the petitioners had "filed an untimely petition for rehearing" in the Court of Appeals, and that the clerk of the court had entered an order granting Petitioners leave to file a "late" petition. Opp'n to Cert. at 6. Jurisdictional objections, in any event, should not be deemed waived even though not raised in the opposition to certiorari. *See* Sup. Ct. R. 15.2, 15.4.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

1. Statement of the Facts 1

2. Proceedings in the Lower Courts 9

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. THE COURT LACKS JURISDICTION IN THIS CASE SINCE THE STATE'S PETITION FOR REHEARING WAS UNTIMELY AND DID NOT TOLL THE 90-DAY PERIOD FOR SEEKING CERTIORARI 19

A. The Ninety Day Period for Filing is Jurisdictional and Is Not Tolled By an Untimely Petition for Rehearing . . . 19

B. The State's Petition for Rehearing Was Untimely, the Circuit Court Denied It, and Accordingly the 90-Day Period for Seeking Certiorari Was Not Tolled 22

II. THE STATE VIOLATED HARPER'S RIGHT TO DUE PROCESS WHEN IT REINCARCERATED HIM WITHOUT A HEARING . . . 26

A. "Preparole" Is a Parole Program, and Gives Rise to a Fundamental Liberty Interest Under the Due Process Clause 26

B. The State's Newly-Asserted Claim That It May Revoke Preparole "For Any Reason or No Reason" Is Unsupported By the Record and Is Incompatible With Substantive Due Process 38

C. A Morrissey-Style Hearing is Required . 42

1. The Private Interest 43

2. The Value of a Hearing 44

3. The State's Interest 47

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993) 12

Bearden v. Georgia, 461 U.S. 660 (1983) 39

Black v. Romano, 471 U.S. 606 (1985) 39, 46

Bowman v. Loperena, 311 U.S. 262 (1940) 23

Bowser v. Vose, 968 F.2d 105 (1st Cir. 1992) . . . 35, 36

Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968) . . . 20

Chin Gum v. United States, 150 F.2d 765 (1st Cir. 1945) 23

Cruzan v. Director, Missouri Dep't of Health, 110 S.Ct. 2841 (1990) 34

Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Hileman, 897 F.2d 1277 (4th Cir. 1990) 23

Douglas v. Buder, 412 U.S. 430 (1973) 39

Federal Election Comm'n v. NRA Political Victory Fund, 115 S.Ct. 537 (1994) 20

Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 23

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 23, 26

Foucha v. Louisiana, 504 U.S. 71 (1992) 34

Gagnon v. Scarpelli, 411 U.S. 778 (1973) . . . 28, 43, 46

Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979) 28

Harper v. Young, 64 F.3d 563 (10th Cir. 1995) 15

Harper v. Young, 852 P.2d 164 (Okla. Crim. App. 1993) 11, 12, 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 42

Meachum v. Fano, 427 U.S. 215 (1976) 27

Missouri v. Jenkins, 495 U.S. 33 (1990) . . 18, 20, 22, 25

Morrissey v. Brewer, 408 U.S. 471 (1972) . . . . . *passim*

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942) . . . . . *passim*

Planned Parenthood v. Casey, 505 U.S. 833 (1992) . . 37

Sandin v. Conner, 115 S.Ct. 2293 (1995) 32, 33

Schall v. Martin, 467 U.S. 253 (1984) 46, 47

Smith v. Saxbe, 562 F.2d 729 (D.C. Cir. 1977) . . 35, 36

Spurlock v. State of Oklahoma, 720 P.2d 733 (Okla. Crim. App. 1986) 30

Stone v. I.N.S., 115 S.Ct. 1537 (1995) 20

Thornburgh v. Abbott, 490 U.S. 401 (1989) 39, 40

Turner v. Safley, 482 U.S. 78 (1987) 40

United States v. Taylor, 47 F.3d 508 (2d Cir. 1995) . . 36

Washington v. Harper, 494 U.S. 210 (1990) 42

Wayne United Gas Co. v. Owens Illinois Glass Co., 300 U.S. 131 (1937) 23

Wolff v. McDonnell, 418 U.S. 539 (1974) . . . . . *passim*

Statutes and Rules

28 U.S.C. § 2101(c) 19

Okla. Stat. tit. 57, § 347 29

Okla. Stat. tit. 57, § 350 32

Okla. Stat. tit. 57, § 365 . . . . . *passim*

Okla. Stat. tit. 57, § 512 29

Okla. Stat. tit. 57, § 332.7 . . . . . 1, 2, 4, 34

Okla. Stat. tit. 57, § 332.8. . . . . 1, 34

Sup. Ct. R. 15.2 i

Sup. Ct. R. 15.4 i

Fed. R. App. P. 40(a) 20, 21, 22, 24, 25

Fed. R. App. P. 26(b) 20, 21, 22

Tenth Circuit Local Rule 27.4.4 . . . . . 20, 22

Tenth Circuit Local Rule 40.1 25

Procedures

DOC Interim Pre-Parole Conditional Supervision Revocation Procedure OP-060208 . . . . . 9, 11, 14

DOC Policy and Operations Manual Procedure 0P-090104 8

DOC Policy and Operations Manual Procedure 0P-160120 3

Pardon and Parole Board Procedure 004-11 (effective 9/1/89) 4, 8, 11, 14

Pardon and Parole Board Procedure 004-11 (effective 8/8/91) . . . . . *passim*

Pardon and Parole Board Procedure No. 004-11 (effective 4/1/94) 4, 8, 9, 14

Other Authorities

C. Camp & G. Camp, The Corrections Yearbook -- Probation & Parole (1990) 49

C. Camp & G. Camp, The Corrections Yearbook -- Adult Corrections (1995) 49

C. Camp & G. Camp, The Corrections Yearbook -- Probation & Parole (1995) 49

Daily Oklahoman May 29, 1996 4

Orientation for Preparole Conditional Supervision 5

Pardon and Parole Board Brochure (1989) . 2, 3, 8, 30, 45

Pardon and Parole Board Brochure (1992) 3, 8

Parole Fact Sheet (effective 6/91) 3, 5, 29

Rules and Conditions of Pre-Parole Conditional Supervision (effective 9/90) 3, 5, 29, 32

Rules and Conditions of Pre-Parole Conditional Supervision (effective 6/93) 3

STATEMENT OF THE CASE

1. Statement of the Facts

Ernest Eugene Harper has served 21 years of a life sentence. In 1990, the Oklahoma Pardon and Parole Board[1] considered Mr. Harper for release from prison under two separate conditional release programs: parole and "preparole."[2] The Parole Board decided to recommend Mr. Harper under both programs.[3]

Oklahoma's "preparole" program is parole by another name; essentially, it is early parole. A prisoner must serve 30 percent of his sentence to be eligible for parole, only 15 percent to be eligible for preparole; otherwise, the eligibility requirements and criteria are identical. Mr. Harper met *all* criteria for parole eligibility.[4]

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[1] Hereinafter Parole Board.

[2] Preparole Conditional Supervision Program (hereinafter preparole). *See* Okla. Stat. tit. 57, § 365 (1989).

[3] State's Resp. Br. at 1, filed November 10, 1992 (Okla. Crim. App.)(No. H-92-0735); Pet. for Habeas Corpus at 6, filed October 13, 1993 (N.D.Okla.)(No. 93-CV-948).

[4] To be eligible for the preparole program, a prisoner must meet all the criteria for parole eligibility (except for percentage of sentence served), which are set forth in Okla. Stat. tit. 57, §§ 332.7 and 332.8, and must be within one year of his regularly scheduled parole consideration date or his projected release date. *See* Okla. Stat. § 365(A)(2). The Parole Board must "inquire into the conduct and the record" of the person during his custody in the DOC, Okla. Stat. § 332.7(A), and must consider, among other things, the number of previous felony convictions, the type of criminal violations leading to any such criminal convictions, and in every appropriate case monetary restitution to victims. Okla. Stat. § 332.8. Mr. Harper had served 15 years of his sentence at the time the Board

The purposes of the two programs overlap. The purposes of preparole are to reduce prison overcrowding[5] and to "reintegrate the prisoner in society;"[6] the purposes of parole are "to alleviate the costs to society of keeping an individual in prison" and "to help individuals reintegrate into society as constructive individuals as soon as they are able."[7] Like a parolee, a preparolee reports periodically to a parole officer for supervision in the community,[8] and has no contact with prison officials unless he is returned to prison.[9] Like a

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recommended him for parole. Under Oklahoma law, this is considered one-third of a life sentence for purposes of parole eligibility. Resp't App. A at 3a, Parole Board Brochure (1989).

[5] Okla. Stat. § 365 provides that whenever the population of the prison system exceeds 95% of capacity, the Department of Corrections (hereinafter DOC) and the Parole Board shall implement the preparole program until such time as the population is reduced to 92 1/2% of capacity, for persons in the custody of the DOC who meet certain guidelines. The parole statute provides that parole may also be used as a device to reduce overcrowding, in certain specified cases. *See* Okla. Stat. tit. 57, § 332.7(B).

[6] State's Resp. Br. at 3, filed November 10, 1992 (Okla. Crim. App.) (No. H-92-0735); State's Resp. Br. at 5, filed December 6, 1993 (N.D. Okla.) (No. 93-CV-948); State's Opp'n Br. at 7 n.2. filed April 5, 1995 (9th Cir.)(No. 95-5026).

[7] *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The Oklahoma statutes do not recite the purposes of either parole or preparole.

[8] Parole officers supervise both parolees and preparolees. Appendix A to Respondent's Brief (hereinafter Resp't App.) at 7a, 9a, Oklahoma Parole and Pardon Board Brochure, 1989 (hereinafter Parole Board Brochure).

[9] *See* Opp'n to Resp. to Pet. for Habeas Corpus at 6, filed December 13, 1993.

parolee, he can be removed from the program and returned to prison if he does not comply with the conditions of his release.[10]

The standard conditions of release are nearly identical in the two programs.[11] Consequently, when the State of Oklahoma releases a prisoner on preparole, it conditionally restores to him essentially the same freedoms of association, autonomy, independence, dignity, and bodily privacy enjoyed by parolees. Like parolees, preparolees are free from surveillance by prison guards, and free from the prison rules and regulations which circumscribe the details of a prisoner's daily existence. They are free to wear what they choose, to eat what they choose, to rise, go to bed, and turn out the light when they choose; they are free to guard their bodily privacy; they are free to consult with a doctor whenever they see fit; subject to the conditions of their release, they are free to associate and correspond with whomever they choose, to recreate and socialize as they wish, to spend time alone with family and loved ones; to earn a living at whatever honest employment their skills and experience fit them for, at

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[10] Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

[11] *Compare* Resp't App. C, Parole Fact Sheet, Standard Rules and Conditions *with* J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The only difference between these two sets of rules and conditions is that a parolee cannot leave the state to which he is paroled without written permission, while a preparolee cannot leave the State of Oklahoma under any circumstances. The burdens of this conditional freedom are also similar. For example, as of 1993, parolees and preparolees alike are entirely responsible for their own medical care and medical expenses, "includ[ing] any cost incurred for emergency medical care." *See* Resp't App. E at 35a, DOC Operations Manual Procedure OP160120, and Resp't App. D at 33a-34a, Rules and Conditions of Preparole Conditional Supervision (effective 6/93).

whatever wages their abilities may command; and to spend their wages as they see fit. In short, exactly like parole, preparole contemplates nothing less than the offender's reintegration into society.

The chief difference between the two programs lies in the admission process. Under both programs, the prisoner must be recommended for release by the Parole Board; but in the case of parole that recommendation must be approved by the Governor, and in the case of preparole by the DOC.[12] The Governor has no statutory role in granting or revoking preparole.[13] The programs operate on separate tracks within the statutory framework. Participation in preparole is not necessarily a prerequisite to parole,[14] and parole denial does not disqualify a preparolee from continued participation in the preparole program.[15] In fact, according to a DOC spokesman, "most preparole inmates who are turned down for full parole are allowed to remain out of prison."[16]

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[12] Okla. Stat. §§ 332.7(A), 365. When the DOC rejects a preparole applicant recommended by the Parole Board, an administrative review committee comprised of DOC and Parole Board staff members jointly reviews his suitability for preparole. Appendix F to Petitioner's Petition for Certiorari (hereinafter Pet'r App.) at 45a.

[13] Okla. Stat. § 365; Resp. Br. at 11, 14, filed November 10, 1992 (H-92-0735).

[14] *See* Okla. Stat. § 332.7; *see also* Pet'r App. G at 55a, Pardon and Parole Board Procedure 004-11 ("Inmates who are not recommended by the Board [for preparole] will be considered for parole on the regularly scheduled docket.")

[15] *See* Okla. Stat. § 365; Pet'r App. G at 56a; Resp't App. F at 38a, Parole Board Procedure 004-11 (April 1, 1994).

[16] Resp't App. G at 42a, Daily Oklahoman, May 29, 1996 at 6.

On October 16, 1990, Mr. Harper was released from prison on preparole. The Parole Board's recommendation to the Governor for parole was still pending.

Prior to his release, Mr. Harper and his caseworker executed a form titled "Rules and Conditions of Preparole Conditional Supervision." (J.A. at 7-9). The conditions of release were almost identical to the Standard Rules and Conditions governing Oklahoma parolees.[17] The preparole form also contained the stipulation, "I understand that waiving parole while on pre-parole status will result in reclassification to higher security status."[18] The form did not indicate that parole *denial* would result in any change in status.

After his release, Mr. Harper was required to execute a second form, titled "Orientation for Preparole Conditional Supervision," which states "[t]his orientation is provided to insure that each Offender is aware of the rules, responsibilities, expectations and possible consequences of not meeting these obligations." (J.A. at 4). Following a list of rules and obligations is the stipulation "I [] understand that being classified to community level depends upon my compliance with each of these expectations." (J.A. at 6). The form also included the stipulation, "Reviewed options in the event of parole denial." (J.A. at 5). The form did not provide

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[17] *See* Resp't App. C, Parole Fact Sheet. There is a blank space provided on the preparole form for "special conditions by the Pardon and Parole Board" but there were no special conditions listed in Mr. Harper's case. J.A. at 9, Rules and Conditions of Pre-Parole Conditional Supervision. Special conditions may also be imposed in parole. Resp't App. C, Parole Fact Sheet.

[18] J.A. at 9. The State presented no evidence in the lower courts as to the meaning of this provision.

that Mr. Harper would be returned to prison if the Governor did not approve him for parole.[19]

During the five months that he was in the program, Mr. Harper's existence in the community was virtually identical to that of a parolee. He lived in an apartment in Tulsa for which he paid rent, he was gainfully employed, and he was free to be with his family and friends and to form other attachments of normal life.[20] He had no contact at all with correctional officers, and only periodic meetings with a parole officer for counselling and supervision.[21] The State does not contend that Mr. Harper violated a single rule or condition of

[19] The State has never presented any evidence as to what, if anything, Mr. Harper was actually told about the effect of parole denial, or what the "options" were that are mentioned here. The State has never gone so far as to make the direct claim that Mr. Harper was told preparole could or would be revoked. If an evidentiary hearing had been held, Mr. Harper would have testified that no explanation was ever given to him about the meaning of this stipulation, and that he was given no reason to believe that he would be returned to prison merely because the Governor denied parole.

[20] Br. in Opp'n to Resp. to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948). If the case is remanded for further findings, Mr. Harper will present evidence that he worked at a highly responsible job obtained through his own initiative and merits, made his own decisions as to how he would he spend his salary, paid his own bills, socialized, and visited public libraries, movies, parks, church and grocery stores without supervision; that he never had any contact with prison guards or with DOC officials of any kind; and that his only contact with program administrators was a periodic meeting with a parole officer, who monitored his progress and offered counsel and advice.

[21] Opp'n to Response to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948).

preparole, or that he was anything less than a model participant.[22]

On March 14, 1991, after five months at liberty, Mr. Harper's parole officer telephoned him at 5:30 in the morning to inform him that the Governor had not approved him for parole, and that he must report back to prison by ten o'clock.[23] Mr. Harper reported back to prison as directed. He was never granted a hearing, either before or after his return to prison, on whether his preparole status should be revoked.[24]

The Oklahoma statutes do not enumerate grounds for revoking either parole or preparole,[25] and do not provide that parole denial shall affect preparole status. Nor, during the

[22] (Pet'r Br. at 7). If Mr. Harper had been granted a hearing before his preparole status was revoked, as the State's regulations now provide, he would have presented testimony from his parole officer, employer, family, friends, and other members of the community as to his exemplary work record, conduct, and attitude while on preparole.

[23] The State has never offered any evidence and the record is silent as to the identity of the State agency or official who made the decision to return Mr. Harper to prison.

[24] Resp. Brief at 1, filed November 10, 1992 (No. H-92-0735); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948); Opp'n to Pet. for Writ of Habeas Corpus at 2, filed December 13, 1993 (No. 93-CV-948).

[25] In 1993, the preparole statute was amended to specify that preparole can be revoked for failure to make satisfactory progress in an educational program in which the inmate has been required to participate as a condition of eligibility in the program. Any such inmate "shall be returned to confinement in the custody of the Department of Corrections." Okla. Stat. §§ 365(A)(3) and (G) (effective as amended 4/29/93).

time Mr. Harper was in the preparole program, did the administrative regulations implementing the program indicate that parole denial could affect participation in the preparole program.[26] However, on August 8, 1991, five months after Mr. Harper was returned to prison, the Parole Board amended its Procedure No. 004-11, to provide that "[i]nmates who are denied [parole] by the Governor shall remain on PPCS [preparole] and shall be reviewed by the Parole Board ninety days from denial to determine whether or not the Parole Board desires to allow the inmate to remain on PPCS."[27] On April 1, 1994, the Parole Board again amended its Procedure No. 004-11, this time to provide that "[i]nmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due

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[26] Resp't App.H at 43a-50a, Parole Board Procedure 004-11 (effective September 1, 1989); Pet'r App. F at 43a-52a, DOC Procedure 090104 (effective July 4, 1990). The Parole Board's brochures suggest that the only grounds for preparole revocation are failure to comply with the conditions of release, or an election by the preparolee not to be considered for parole:

> The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she elects not to be considered for parole. ... Governor approval is not required for [preparole].

Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

[27] Pet'r App. G at 56a, Pardon and Parole Board Procedure 004-11 (effective August 8, 1991).

process."[28] The State has never provided any kind of revocation hearing to Mr. Harper. He remains in prison.

2. Proceedings in the Lower Courts

Although key issues of fact were disputed in this case in the courts below,[29] Mr. Harper's requests for an evidentiary hearing were denied,[30] as were his requests for appointment of counsel.[31]

Mr. Harper filed a *pro se* Petition for Habeas Corpus in state court, challenging the State's revocation of preparole without affording him due process.[32] The court denied Mr. Harper's petition on the ground that habeas corpus was an

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[28] Resp't App. E, Parole Board Procedure 004-11, as amended April 1, 1994. Furthermore, on October 29, 1992, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972), the DOC promulgated hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp't App. I, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208.

[29] These factual disputes included whether Mr. Harper had notice that he would be removed from the program if parole were denied; to what extent preparole resembles parole, other release programs, or incarceration; and the nature of the State's interest in revoking preparole without a hearing.

[30] *See* Opp'n to Resp. to Pet. for Habeas Corpus at 3, filed December 13, 1993 (No. 93-CV-948).

[31] *See* J.A. at 13-14, Mtn. for Appointment of Counsel, filed June 20, 1994; District Court Order filed June 27, 1994; Appellant's Opening Brief at 9-10, filed February 24, 1995 (No. 95-5026).

[32] Pet. for Writ of Habeas Corpus, dated March 20, 1992 (No. C-92-44).

inappropriate vehicle to challenge the revocation.[33] Mr. Harper then filed *pro se* in the court of criminal appeals.[34] That Court ordered the State to respond, stating:

> When a prisoner is released from incarceration pursuant to a preparole conditional supervision program and lives outside institutional facilities, the due process clause vests this person with a liberty interest in remaining in said program. Therefore, the minimum requirements of *Morrissey* must be observed before this person can be removed from the program for a rule or condition violation. However, the record before this Court reflects that petitioner was not removed from the [preparole] program for a violation of a rule or condition of probation, but that he was removed because he was no longer eligible for the program because the Governor did not sign his out-of-state parole recommendation.
>
> We are, therefore, directing the ... State ... to respond to Petitioner's application, specifically addressing eligibility for the [preparole] program when the Governor does not approve parole after a prisoner has been recommended for parole and placed in the [preparole] program by the ... Parole Board and the Department of Corrections. The response shall also address any due process protections required before a prisoner is removed from the [preparole] program because the Governor does not approve parole.[35]

[33] Journal Entry and Order at 3, filed May 19, 1992 (No. C-92-44).

[34] Application for Extraordinary Writ of Habeas Corpus dated August 10, 1992 (No. H-92-0735).

In its response, the State supplied the court with amended Parole Board Procedure 004-11 (issued five months *after* Mr. Harper was returned to prison) as evidence that "inmates are aware that they will only remain on preparole status so long as they remain otherwise eligible for parole."[36] The State claimed that Mr. Harper was "no longer eligible" for preparole after the governor denied parole.[37]

[35] Order Directing Response at 2, filed September 10, 1992 (No. H-02-0735).

[36] *See* Pet'r App. G at 55a-56a; *Harper v. Young*, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The State did not provide to the court the version of Parole Board Procedure 004-11, in effect in 1990 when Mr. Harper was in the program, which does *not* indicate that parole denial could be a basis for preparole revocation; or with the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp. Br. filed November 10, 1992 (No. H-92-0735); Resp't App. H at 43a, Parole Board Procedure 004-11 (effective September 1, 1989); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, (effective October 29, 1992).

[37] Resp. Br. at 12-13, filed November 10, 1992 (No. H-92-0735). The State also asserted that preparole was similar to house arrest rather than to parole, without supplying any evidence of the nature of either preparole or house arrest. *See id.* at 3. *See also* Resp. Br. at 5 filed December 6, 1993 (No. 93-CV-948); Opp'n Br. at 7 n.2 filed April 5, 1995 (No. 95-5026). In the State's Petition for Rehearing filed in the Tenth Circuit, the State argued that preparole was like minimum security prison confinement, *see* Pet. for Reh'g at 5, filed September 15, 1995 (No. 95-5026), but did not present any evidence about the nature of minimum security confinement in Oklahoma. In this Court, the State argues that preparole is akin to furlough, without presenting any evidence about the nature of Oklahoma's furlough program. (Pet'r Br. at 15 n.9).

The court of criminal appeals thereupon reversed its earlier decision that *Morrissey* applied to preparole revocations. *Harper v. Young*, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The court stated that the issues presented by Mr. Harper were "fully addressed" in a decision it had issued the same day in a companion case, *Barnett v. Moon*, 852 P.2d 161, 162 (Okla. Crim. App. 1993). *Barnett* held that preparolees were not entitled to a revocation hearing under *Morrissey v. Brewer* because the very word "preparole" shows that a person in the program has not been released from prison:

> The prefix "pre" means "in front," "before," or "in advance." . . . Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. Therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, . . . logically preparole means before such release.[38]

Barnett, 852 P.2d at 162. Applying *Barnett* to Mr. Harper's case, the court reasoned that since preparolees are, "by definition," already "confined," the "degree of confinement" when they are returned to prison is of no concern to the court, "so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified." *Harper*, 852 P.2d at 165. The court went on to hold that amended Parole Board Procedure

[38] The court ignored the common use of the prefix "pre" to denote something already done, or done early: as in "preview," "prearranged," "preheat," "precook," "prepay," "preset," "predetermined." In this typical usage of the prefix "pre," preparole means "early parole."

004-11 (issued five months *after* Mr. Harper was returned to prison) afforded him both notice and due process, because it:

> gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole. The governor's refusal to grant parole does not change the fact that Petitioner is confined and the provisions of *Morrissey* do not apply. The procedures used by the Pardon and Parole Board in determining whether Petitioner should stay in the [preparole] program assure [Harper] he is receiving the process that is due him.

Id. Thus, the court of criminal appeals' decision was based on three findings of fact, not one of which had been tested at an evidentiary hearing, and all of which Mr. Harper contests: (1) that he had been in "confinement" while in the preparole program; (2) that the Parole Board regulation issued after he had been returned to prison had given him notice that he could be removed from the program if parole were denied; and (3) that his case had been reviewed pursuant to the newly-issued regulation.

On October 13, 1993, Mr. Harper filed a *pro se* Petition for Habeas Corpus in Federal District Court.[39] The State asserted that preparole was like the House Arrest Program (without supplying any evidence to permit a comparison) and again asserted that Mr. Harper became ineligible for preparole

[39] He filed a Motion for Appointment of Counsel in the District Court on June 20, 1994, based, *inter alia*, on the complexity of the issues involved in the case, and his limited knowledge of the law. J.A. at 13-14. The motion was denied. District Court Order issued June 27, 1994 (No.93-CV-948).

when the governor denied parole.[40] Without holding an evidentiary hearing, the court denied the writ, on the ground that a prisoner in preparole "has not yet 'been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person;'" that Mr. Harper "had not been released from institutional life altogether;" and that requiring a due process revocation hearing would undercut the statutory purpose to relieve overcrowding.[41] The district court issued a Certificate of Probable Cause,[42] and Mr. Harper filed an appeal to the Tenth Circuit *pro se* on February 24, 1995.

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[40] Resp. Br. at 5, filed December 6, 1993 (No. 93-CV-948).

[41] District Court Order at 6, 10 and n.4, filed January 10, 1995 (No. 93-CV-948). The court accepted the State's unsupported assertions on these matters. The State did not provide to the court the 1989 version of Parole Board Procedure 004-11, that was in effect when Mr. Harper was in the preparole program. Resp. to Order Dated July 28, 1994, filed August 25, 1994 (No. 93-CV-948). That procedure does *not* indicate that parole denial could lead to revocation from preparole. *See* Resp't App. H at 43a, Parole Board Procedure 004-11 (effective 9/1/89). The State also failed to provide to the District Court the 1994 amendment to Parole Board Procedure 004-11 providing that "inmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process;" or the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp't App. F at 38a, Parole Board Procedure 004-11 (effective 4/1/94); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208; Resp. to Order dated July 28, 1994 filed August 25, 1994 (No. 93-CV-948). In response to a district court Order to produce the implementing procedures for the Preparole Program, the State incorrectly represented that the 1991 version of Procedure 004-11 was the "first written procedure [by the Parole Board] regarding" preparole. *Id.* at 1 n.1.

[42] Certificate of Probable Cause, filed February 13, 1995 (No. 93-CV-948). *Id.*

On August 30, 1995, the Tenth Circuit reversed the district court's ruling and remanded, directing the lower court to issue the writ of habeas corpus unless Mr. Harper was reinstated to preparole, and ordering the State to provide Mr. Harper with a due process hearing prior to any future revocation. *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995). The court of appeals found that preparole was "sufficiently similar to parole or probation to merit protection by the Due Process Clause itself," in that participants are selected by the Parole Board, are "free to enjoy most of the benefits of a normal existence," and are subject to restrictions similar to those of a parolee. *Id.* at 565. The court also found that "[t]he liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate," and that

> [t]he passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind* of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in *Morrissey*.

Id. at 566 (citation omitted). The court noted that Mr. Harper was revoked from preparole because he was denied parole, but that "nothing in the regulations governing the program mandated that result," and pointed to Procedure 004-11 as evidence that revocation is not mandated. *Id.* at 565.

The State of Oklahoma filed an untimely Petition for Rehearing and Suggestion for Rehearing En Banc, on September 15, 1995, sixteen days after the entry of judgment. On September 25, 1995, the Tenth Circuit entered an order *sua sponte* which "grant[ed] appellees leave to file a late

petition for rehearing and suggestion for rehearing en banc."[43] On February 21, 1996, the court of appeals issued its mandate to the district court,[44] and on February 28 the district court issued its order directing that Mr. Harper be released immediately from prison or reinstated in the program. (J.A. at 15, District Court Order (No. 93-CV-948)). Also on February 28, the court of appeals entered an order (*nunc pro tunc* to February 13, 1996), denying the State's Petition for Rehearing, without any discussion of the merits.[45]

The State filed a motion in the court of appeals, seeking recall of its mandate and a stay, pending application to this Court for certiorari.[46] The Motion to Recall the Mandate and for a Stay was granted. (J.A. at 16, Order filed March 6, 1996 (No. 95-5026)). The State filed a Petition for a Writ of Certiorari on April 4, 1996, within 90 days of the denial of the untimely petition for rehearing, but more than 90 days after the original entry of judgment in the Tenth Circuit on August 30, 1995.

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[43] Order issued September 25, 1995 (No. 95-5026).

[44] Order issued February 21, 1996 (No. 95-5026).

[45] *See* Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95-5026).

[46] The sole reason the State offered for its failure to seek a stay of the mandate until after the mandate had issued was that counsel had received the order denying rehearing on Friday afternoon preceding a long weekend, and that the mandate was due to issue after the holiday; hence "counsel was unable to meet [the] deadline." Br. in Support of Mtn. to Recall Mandate and Application for Stay at 3 n.2., filed February 26, 1996 (No. 95-5026).

SUMMARY OF THE ARGUMENT

Ernest Harper was released from prison after the Oklahoma Parole Board reviewed his case and decided to recommend him for two conditional release programs, parole and "preparole." Preparole is essentially early parole. The eligibility requirements, selection criteria, and conditions of release and are virtually identical in both programs. Admission to both programs is only upon recommendation of the Parole Board. The main difference between the two programs is that for preparole the DOC must approve the Board's recommendation, while for parole the Governor must approve the Board's recommendation. The Governor plays no statutory role in the grant of preparole.

Mr. Harper was released from prison under the preparole program, with the Board's recommendation for parole still pending. While in the community, he conducted himself as a model citizen. Five months after his release, the Governor decided not to approve parole, and the State informed Mr. Harper that he must report back to prison. Mr. Harper did so. The State never granted him any kind of hearing to determine whether his return to prison was warranted.

In the courts below, the State claimed that it returned Mr. Harper to prison because the Governor's denial of parole made Mr. Harper ineligible for preparole under the statute. It transpired that this was incorrect. Oklahoma statutes mandate no such result, and furthermore the Parole Board's implementing regulations provide just the opposite: the agency presumption is that denial of parole shall have no effect on preparole status. The State now offers a new rationale for returning Mr. Harper to prison without a hearing: it claims the authority to return preparolees to prison "for any reason or no reason," and argues that since it has unlimited

discretion to return persons to prison from preparole, fact-finding is unnecessary and a hearing would be pointless.

The Tenth Circuit found that preparole was similar to parole; held that *Morrissey v. Brewer*, 408 U.S. 471 (1972), was applicable; and ordered the State to release Mr. Harper and not return him to prison without a hearing in conformity with *Morrissey*. The State filed an untimely petition for rehearing of this judgment. The Circuit Court accepted the late filing, but denied the State's untimely petition, without reaching the merits. The State then filed for certiorari, more than 90 days after the entry of the Circuit Court's original order.

The 90-day period for filing for certiorari is jurisdictional and not subject to equitable tolling. *See Missouri v. Jenkins*, 495 U.S. 33 (1990). Only timely petitions for rehearing toll the 90-day period for rehearing; an untimely petition has no such effect, unless the court of appeals grants it. *See Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942). Here, the Circuit Court denied the State's untimely petition. Therefore, the 90-day period for certiorari commenced with the entry of the Circuit Court's original order, and the State's petition for certiorari was untimely. Accordingly, this Court lacks jurisdiction, and should dismiss the case and remand to the Tenth Circuit. *See infra* Point I.

In the event the Court does not dismiss for lack of jurisdiction, it should affirm the decision of the Tenth Circuit. The difference between parole and the "preparole program" is only one of nomenclature under *Morrissey*. In releasing Mr. Harper from prison, the State restored to him on a conditional basis many of the core values of unqualified liberty, just as it does when it releases a person on parole. Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison arbitrarily, "for

any reason or no reason." A *Morrissey*-style hearing was required to provide sufficient protection against an erroneous, arbitrary and unnecessary deprivation of the freedom the State had conditionally restored to him. Mr. Harper was entitled to an opportunity to show that it would be inappropriate to return him to prison; and the State was obliged to decide on the basis of verified facts and informed discretion whether Mr. Harper was fit to remain at liberty.

ARGUMENT

I. THE COURT LACKS JURISDICTION IN THIS CASE SINCE THE STATE'S PETITION FOR REHEARING WAS UNTIMELY AND DID NOT TOLL THE 90-DAY PERIOD FOR SEEKING CERTIORARI

A. The Ninety Day Period for Filing is Jurisdictional and Is Not Tolled By an Untimely Petition for Rehearing

Congress has limited the Supreme Court's jurisdiction to entertain petitions for certiorari by requiring that the petition must be filed within 90 days after entry of the judgment for which review is sought. 28 U.S.C. § 2101(c).[47] As this Court has stressed:

> This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the entry of the

[47] Section 2101(c) provides that a Justice of the Supreme Court, for good cause shown, may extend the time for applying for the writ for a period not exceeding 60 days. The State did not seek an extension in this case, and none was granted.

Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990). *Accord Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539, 543 (1994). Statutory provisions specifying the timing of judicial review "are not subject to equitable tolling." *Stone v. I.N.S.*, 115 S. Ct. 1537, 1549 (1995). *See also Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 212 (1968).

A timely petition for rehearing in the court of appeals does extend the time for filing a petition for certiorari, by suspending the finality of the judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the parties' rights. *See Missouri v. Jenkins*, 495 U.S. at 45-46 (citing *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942)). In contrast, an untimely request for rehearing does not extend the period for seeking review. *See Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150-51 (1942).

Here, the State's petition for rehearing was unquestionably untimely. The court of appeals' judgment was entered August 30, 1995. On September 15, sixteen days after the entry of judgment, without the time for filing having been enlarged by local rule, and without the State having sought or been granted an enlargement of time in which to file for rehearing,[48] the State filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The State's Petition for

[48] The State could have sought an enlargement of time in which to file for rehearing, pursuant to Fed. R. App. P. 40(a) and 26(b), and Tenth Circuit Local Rule 27.4.4.

Rehearing was thus filed two days out of time.[49] Ten days later, the Tenth Circuit entered an order *sua sponte* which "grant[ed] appellees leave to file a *late* petition for rehearing and suggestion for rehearing en banc."[50]

Of course, the courts of appeals have the equitable power, reflected in Rules 40(a) and 26(b), Fed. R. App. P., to enlarge the time for filing a petition for rehearing, and to permit filing even after the time for filing has expired. Had the State timely moved for an enlargement of time in which to file a petition for rehearing, the court could have granted it; and had the State by motion shown "good cause," even *after* the expiration of the deadline for the petition for rehearing, the court could have entered an order under Rule 26(b) enlarging the time after the fact. Had the court of appeals done so, and entered an order accepting the late petition *nunc pro tunc*, the State could now claim that the court had made its untimely petition "timely."

But there is no occasion for the Court to decide whether the courts of appeals can make untimely petitions for rehearing "timely" in a case such as this, by entering an order permitting filing "*nunc pro tunc*;" for that is not what happened here. No such order was entered, because the State did not show good cause, or any cause at all, for the late filing, and did not even ask for an enlargement of time, either before or after the expiration of the deadline for filing.

[49] Rule 40(a) provides that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a).

[50] Order filed September 25, 1995 (No. 95-5026) (emphasis added). The Order also provided that "Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order." *Id.*

Consequently, rather than entering an order enlarging the time for filing pursuant to Rules 40(a) and 26(b) and Tenth Circuit Local Rule 27.4.4, the court of appeals instead entered an order accepting the filing of a "late" petition.

The court of appeals' prudential decision to entertain the State's untimely petition did not extend the deadline for applying for certiorari. *Compare Missouri v. Jenkins*, 495 U.S. at 49. In *Jenkins*, the State filed a document in the court of appeals styled "State Appellants' Petition for Rehearing En Banc," *within* the prescribed time period for petitions for rehearing. *Id.* at 43. The question was whether this document actually constituted a "petition for rehearing," so as to toll the 90-day period. This Court concluded that it did. *Id.* at 47-48. In *Jenkins*, unlike this case, the court of appeals corrected the record by entering an order *nunc pro tunc* denying the State's "petition for rehearing with suggestion for rehearing in banc." *Id.* at 49. The court of appeals "cannot make the record what it is not," but it could correct the record to show that it had in fact entertained and denied a "petition for rehearing," even though the petition was incorrectly styled. *Id.* at 49-50.

There is only one exception to the rule that an untimely petition does not toll the period for seeking review, and this case is not within that exception. *See infra* Point I.B.

B. The State's Petition for Rehearing Was Untimely, the Circuit Court Denied It, and Accordingly the 90-Day Period for Seeking Certiorari Was Not Tolled

The Court has recognized but a single, narrow exception to the strict jurisdictional rule that only a timely petition for rehearing tolls a time for appeal: An untimely petition for rehearing tolls the limitations period for review *only* if the

court not only entertains, but actually grants, the petition for rehearing, and then proceeds to a merits review. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149-151 (1942). *Accord Wayne United Gas Co. v. Owens Illinois Glass Co.*, 300 U.S. 131, 137 (1937); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940).[51]

The mere fact that a court decides to entertain an untimely petition for rehearing does not mean that there is a merits review, for "[o]f course, the court must examine the petition to see whether it should be granted." *Pfister*, 317 U.S. at 150. "If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough." *Id.*

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[51] *See also Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210-12 (1952)(Court lacked jurisdiction to hear petition for certiorari as the 90-day period had not been tolled by untimely petition for review of the court of appeals' judgment, or the court's subsequent revision of that judgment in an immaterial way (citing *Pfister*)); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20-21 & n.1. (1952)(dictum)(even if the motion resulting in the second order were viewed as an untimely petition for rehearing, the period for certiorari was tolled since the second order modified the first order, and therefore the court of appeals' reconsideration of its first order was "on the merits"); *Chin Gum v. United States*, 150 F.2d 765, 766 (1st Cir. 1945)(per curiam)(where 30-day period for petition to Supreme Court for certiorari expired, subsequent untimely petition for rehearing, filed by leave of court of appeals, but denied, did not revive jurisdiction of Supreme Court; result would have been different if the case had been restored to the docket for reargument (citing *Pfister*)); *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990)(untimely motion for reconsideration tolled the period for review since the motion for reconsideration was granted, and the Benefits Review Board reaffirmed its original order after considering the merits (citing *Bowman*)).

Under *Pfister*, any ambiguity about whether a court reached the merits of a rehearing petition is appropriately resolved by examining the terms of the court's order:

> [T]he order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the original order. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

Pfister, 317 U.S. at 150-51 (citation omitted).

In this case, it is clear that the Tenth Circuit did not decide the untimely petition on the merits. On February 28, 1996, the court entered an order denying the petition for rehearing, without restoring the case to the calendar, without issuing an opinion, and without any other indication that it had reached the merits.[52] The February 28 Order shows that the court

> merely consider[ed] whether the petition set [] out, and the facts . . . offered support[ed], grounds for opening the original order and determine[d] that no grounds for a reexamination of the original order [were] shown.

Pfister, 317 U.S. at 150.[53] Rule 40(a), Fed. R. App. P., is

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[52] Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95-5026).

[53] Of course, the Tenth Circuit undoubtedly did consider the arguments raised in the State's petition for rehearing; "[a] petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked." Fed. R. App. P. 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them." *Missouri v. Jenkins*, 495 U.S. at 46 n.14. But it does not follow from this that there was a merits review. Tenth Circuit Local Rule 40.1 provides that a petition for rehearing will be granted "only if a significant issue has been overlooked or misconstrued by the court."

consistent with the bright-line test in *Pfister*, and with the procedure followed by the court below. The rule[54] contemplates a two-stage decision-making process, whereby the court examines the petition to determine whether it sets forth adequate grounds to justify a rehearing. Only if the petition supports the claim that the panel overlooked points of law or fact will the petition be granted and the court proceed to reconsider the merits.

In reiterating the rule that an untimely petition for rehearing does not toll the period for review unless the petition is granted and the court enters a subsequent judgment on the merits, the Court has warned applicants to

> take heed of [the] principle . . . that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period.

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[54] Fed. R. App. P. 40(a) provides that "[t]he petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present." No oral argument is permitted at this stage; and the opposing party is not permitted to answer the petition unless requested by the court. But, "[i]f a petition for rehearing is *granted*, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case." Fed. R. App. P. 40(a) (emphasis added).

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. at 213. That the party seeking certiorari in this case is the State, and the party opposing it an indigent *pro se* prisoner, is no justification for abandoning a firmly entrenched jurisdictional rule.

II. THE STATE VIOLATED HARPER'S RIGHT TO DUE PROCESS WHEN IT REINCARCERATED HIM WITHOUT A HEARING

A. "Preparole" Is a Parole Program, and Gives Rise to a Fundamental Liberty Interest Under the Due Process Clause

A quarter of a century ago, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court held that a State may not revoke parole without a hearing. Chief Justice Burger, writing for the majority, concluded that

> the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey, 408 U.S. at 484. In reaching this conclusion the Court considered the following factors:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to

> society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

Id. These very same factors dictate a similar result in the case at bar. *See supra* Statement of the Case, at 2 - 7.

Mr. Harper does not dispute that a lawful conviction and prison sentence extinguish a defendant's right to freedom from physical confinement during the term of the sentence, and "empower the State to confine him in any of its prisons" and to "subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). However, when the State chooses to release a person from prison before the end of his sentence and permits him to live entirely outside an institution, "many of the core values of unqualified liberty" which his conviction extinguished are restored to him, even if on a conditional and qualified basis. *Morrissey*, 408 U.S. at 482. This is not "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. The individual has a liberty interest

arising under the Due Process Clause in retaining the conditional freedom the State has restored to him.

Thus, "'[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'" *Morrissey*, 408 U.S. at 482 n.8, (quoting *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971)). To the contrary, the principle that the State may not arbitrarily and capriciously take away the freedom it has conditionally restored is by now deeply imbedded in this Court's jurisprudence. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)(probation cannot be revoked without a hearing); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 10-11 (1979) (there is a "critical distinction" between the initial grant of parole and the revocation of the conditional liberty of parolees); *Wolff v. McDonnell*, 418 U.S. 539, 560-62 (1974) (full range of procedures dictated by *Morrissey* is not required in discipline involving the loss of good-time credits, because "[f]or the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee" since it "does not then and there work any change in the conditions of his liberty.").

The State argues that *Morrissey* is inapplicable here because "the nature of the interest [of a preparolee] is very different from that of the parolee." (Pet'r Br. at 18). However, "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey*, 408 U.S. at 477. None of the differences asserted by the State, either alone or in combination, distinguish preparole from parole for purposes of *Morrissey*. *See supra* Statement of the Case at 2 - 7.

Of course, there are limitations and conditions on the liberty that preparolees enjoy, which "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *Morrissey* at 478; but these limitations and conditions are virtually identical to the standard conditions imposed on parolees in Oklahoma,[55] and are essentially the same as the conditions and limitations described in *Morrissey*.[56] Once Mr. Harper was released

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[55] *See* Resp't App. C at 27a-30a, Parole Fact Sheet; J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State claims that there are "many" differences between parole and preparole conditions, but lists only two:

> (1) a parolee can leave the state while an inmate on the Program [preparole] cannot; and (2) a parolee may be unsupervised after three years on parole while an inmate on the Program must remain supervised at all times. *See* Okla. Stat. tit. 57, § 347 (1991); Okla. Stat. tit. 57, § 512 (Supp. 1993).

Pet'r Br. at 17 n.10. Even these minor differences, however, are less than meet the eye. Parolees who are sex offenders must remain on active supervision until the maximum term of their sentences; other parolees are subject to active supervision beyond three years, at the discretion of the Division of Community Services. *See* Okla. Stat. § 512(2). Parolees cannot leave the state except with written permission, according to the Standard Rules and Conditions for Parolees. *See* Resp't App. C.

[56] The *Morrissey* Court gave the following examples at 408 U.S. at 478:

> Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, travling [sic] outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.

from prison, he had a substantial interest in retaining the freedom that was conditionally restored to him.

The State of Oklahoma argues that *Morrissey* does not apply in this case, because preparole is merely a form of "confinement, albeit constructive." (Pet'r Br. at 17-18).[57] Since "[t]he inmate remains in the custody of the DOC," (Pet'r Br. at 11), it follows that "[t]he only difference between an inmate behind four walls and an inmate on the Program is the security level classification." Because the preparolee is already "constructively" in prison, the State's decision to revoke preparole does not actually return the preparolee to prison; it merely effects a "transfer . . . to a higher security level," a matter "completely within the discretion of the DOC." (Pet'r Br. at 32).

This argument is unpersuasive for two reasons. First, the fact that preparolees are formally "in custody" is of no particular significance; for so are parolees.[58] More important, this very same "in custody" argument was advanced by the State of Iowa, and rejected by the Court, a

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[57] *See also* Pet'r Br. at 11, 15, 24, 28, 30, 31. This reading of the statute is inconsistent with the statutory provision that if preparole is *revoked*, the preparolee "shall be returned to confinement in the custody of the Department of Corrections." *See* Okla. Stat. § 365(G) (Supp. 1995). It is also inconsistent with the Parole Board's reading of the statute: "The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and *brought back to prison*." Resp't App. A at 9a, Parole Board Brochure (1989) (emphasis added).

[58] *See Spurlock v. State of Oklahoma*, 720 P.2d 733, 734 (Okla. Crim. App. 1986), *rev'd on other grounds*, *Plotner v. State*, 721 P.2d 810 (Okla. Crim. App. 1986).

quarter of a century ago, in *Morrissey*. There, the State cited an Iowa statutory provision that "[a]ll paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent."[59] The State argued that since "[t]he parolee while on parole is still within the custody of the correctional authorities" he is therefore "entitled to no greater rights than a prisoner."[60] The Court rejected this argument, finding that parolees have a significant liberty interest in avoiding a return to confinement, and requiring the State to grant a revocation hearing. *See Morrissey*, 408 U.S. at 483-84. "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. That the parolee "is often formally described as being in custody" does not mean that "summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." *Id.* at 483.[61]

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[59] Resp't Br. at 6-7 filed in *Morrissey v. Brewer*, September Term, 1971 (No. 71-5103).

[60] Resp't Br. at 19-20, filed in *Morrissey v. Brewer*, September Term, 1971 (No. 71-5103). The court of appeals in *Morrissey* accepted the State's argument, reasoning that *parole* "is only a correctional device authorizing service of sentence outside the penitentiary," that the parolee is still "in custody," and thus, that "prison officials must have large discretion in making revocation determinations, and [] courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities." *Morrissey v. Brewer*, 408 U.S. at 474-75 (quoting Morrissey, 443 F.2d. 942, 947 (8th Cir. 1971)).

[61] As evidence that a preparolee, unlike a parolee, is "in custody," the State points out that preparolees who abscond may be prosecuted for escape, while parolees who escape merely have their parole revoked. (Pet'r Br. at 11). This difference is irrelevant. While liability to prosecution for escape represents a significant additional motive to

Sandin v. Conner, 115 S.Ct. 2293 (1995), supports the conclusion that Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison without a hearing. Reaffirming the principles articulated in *Morrissey* and *Wolff v. McDonnell*, *Sandin* held that for a liberty interest to arise directly under the Due Process Clause, prisoners must have "suffered a 'grievous loss' of liberty retained even after sentenced to terms of imprisonment." *Sandin*, 115 S.Ct. at 2298 (citation omitted). Under this standard, the Court found that Conner had not suffered such a loss. Disciplinary segregation for 30 days did not "present a drastic departure from the basic conditions of Conner's indeterminate sentence" because the record showed that disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* at 2301. Thus, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not

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preparolees to conform to the rules of their release, it does not in any way reduce or devalue the freedom they enjoy. Equally irrelevant is the fact that Oklahoma law provides that "should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections." (cited in Okla. Stat. § 365; Pet'r Br. at 10-11, 17, 24). To interpret this statute to mean that preparolees are subject to the *same* rules as prisoners would be absurd. By its very nature, life in the community frees the parolee from prison-specific rules; the list of preparole rules which were imposed on Mr. Harper did not include obedience to prison rules. *See* J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State also points to the fact that "[t]he inmate continues to receive earned credits [for time served] while on the Program." (Pet'r Br. at 19 n.12). However, it is not just preparolees but also parolees who continue to receive credit for time served while on release programs. *See* Okla. Stat. tit. 57, § 350(a).

work a major disruption in his environment." *Id.*[62] Chief Justice Rehnquist, writing for the majority, stressed that the State's action in Conner's case would not "inevitably affect the duration of his sentence" since the State's code did not require the parole board "to deny parole in the face of a misconduct record or to grant parole in its absence." *Sandin*, 115 S.Ct. at 2302.

Under the reasoning of *Sandin*, which focused on whether the individual had suffered a "grievous loss" of liberty retained even after sentence to imprisonment, this case presents the very situation in which the Due Process Clause *does* confer a liberty interest. Preparolees, like parolees, are no longer prisoners, even though like parolees they remain "in the custody" of the DOC. The revocation of preparole, exactly like the revocation of parole, is an "immediate disaster," since it "then and there" works a dramatic change in the conditions of the individual's liberty. *See Wolff v. McDonnell*, 418 U.S. at 561. When the State returned Mr. Harper to prison without a hearing, it stripped from him those "core values of unqualified liberty" which it had restored to him when he left the prison five months earlier; he was removed, not to a worse prison from a better prison, but to a

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[62] The Court further held that a state might conceivably create a liberty interest in freedom from restraint in the prison setting, if the restraint involved an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life[,]" *id.* at 2300; but punishment by solitary confinement is not such a restraint, because "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." *Id.* at 2301. Mr. Harper's case, like *Morrissey*, involves a liberty interest arising directly under the Due Process Clause. Although nominally "created" by the State when the prisoner walks out the prison door on conditional release, the liberty at stake is the "core liberty interest" of a free person, which is conditionally and partially restored to the parolee.

prison from freedom. By any measure, this was "a grievous loss" of liberty: freedom from physical confinement "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). "[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self determination," *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2856 (1990) (O'Connor, J., concurring). Since "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, . . . freedom from this restraint is essential to the basic definition of liberty" in the Fifth and Fourteenth Amendments. *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting).

The State claims that parole and preparole are essentially different, because "an inmate is released to parole after an evaluation that he can return to society and function as a responsible person," whereas "[a]n inmate is not placed on [preparole] after a finding that he will function well in society," but rather "pursuant to the need of the State to manage its prison population." (Pet'r Br. at 18). This purported distinction is not supported by the statutory language and has been contradicted by the State's repeated admissions in the lower courts. *See supra* Statement of the Case at 1-2. True enough, Oklahoma's preparole statute does not explicitly require the Parole Board to find that the preparolee "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person;" but not even Oklahoma's *parole* statute explicitly requires the Board to make such a finding.[63] Nevertheless, implicit in the entire statutory and administrative scheme is a

[63] *See* Okla. Stat. § 365; Okla. Stat. §§ 332.7, 332.8.

requirement that the Parole Board determine that a prisoner "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person," before ordering his release on either parole *or* preparole. It is unthinkable that the Parole Board and DOC would exercise their discretion to release a felon *without* making such a determination.

The State further argues that parole and preparole are different because, under *Morrissey*, "a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole," while "an inmate on the [preparole] Program is not given a promise that he will be transferred only if he violates a condition of the Program," but instead "is aware that he may be reclassified to a higher security level [*i.e.*, returned to prison] for any reason," (Pet'r Br. at 18), or "for no reason," (Pet'r Br. at 20). This claim is simply not supported by the statutory language, the implementing regulations, or anything else in this record. Whatever the DOC may tell prisoners *now* about their release on preparole, the record does not show that *Mr. Harper* was provided notice that he could be returned to prison for any reason other than a violation of the conditions of his release. The "evidence" the State cites to the contrary, (Pet'r Br. at 6 & n.3, 20 n.13), simply does not support its assertion. *See supra* Statement of the Case at 5 - 9.[64]

In this Court, although not below, the State argues that preparole is like a furlough, and thus cannot give rise to a liberty interest, citing *Bowser v. Vose*, 968 F.2d 105 (1st Cir. 1992) (per curiam) and *Smith v. Saxbe*, 562 F.2d 729 (D.C.

[64] There was no statutory "promise" to Iowa parolees in *Morrissey* that they would not be returned to prison except for violations of the conditions of their release, any more than there was a statutory "promise" to Mr. Harper (or to Oklahoma parolees, for that matter).

Cir. 1977). However, there is a profound difference between the "liberty" bestowed in a furlough program, and the "liberty" which a conditional release program like parole or preparole restores to a prisoner. The furlough program described in *Bowser v. Vose* was typical of furlough programs, in that it permitted release from prison for a definite, brief period of time, to attend a relative's funeral, visit a critically ill family member, obtain medical care, or establish employment or housing plans for release. *Bowser v. Vose*, 968 F.2d at 106 n.1. The First Circuit explicitly distinguished the prisoner's furlough denial from the deprivation of liberty when parole is revoked based upon the nature of the liberty involved: "'Unlike the parolee or probationer . . . , the furloughed prisoner is on a short string. His freedom is not potentially unlimited in duration even upon compliance with the official rules.'" *Id.* at 107 (citation omitted).[65] Similarly, preparole is utterly unlike furlough because it is potentially unlimited in duration, and the goal is

[65] Likewise, the federal statute at issue in *Smith v. Saxbe* limited furloughs to thirty days, unless extended for specific, enumerated purposes. *Smith v. Saxbe*, 562 F.2d at 731 n.3. The State also cites *United States v. Taylor*, 47 F.3d 508 (2d Cir. 1995), for the proposition that preparole does not give rise to a liberty interest because the defendant was "in custody" while in Connecticut's "Supervised Home Release Program," a program "strikingly similar" to Oklahoma's preparole program; ergo, preparolees must also be "in custody," and if they are "in custody" in the program they have no liberty interest in remaining in the program. (Pet'r Br. at 20-22). *Taylor* did not address the question of whether the defendant had any liberty interest in remaining in Connecticut's "Supervised Home Release Program." The issue in *Taylor* was whether or not the defendant was legally "in custody" while in the Program for purposes of deciding when his term of federal probation began to run.

nothing less than the complete reintegration of the offender into the community.[66]

Nevertheless, the State asserts, when a preparolee is released from prison he is merely "transferred for a limited time for the purpose of overcrowding. Once the purpose of the Program is eliminated, the inmate may be transferred to a facility as his placement in the Program will no longer serve the purpose for which it is intended." (Pet'r Br. at 15 n.9.) In fact, the Oklahoma statute provides nothing of the kind. Rather, the statute provides that whenever the State's prison population exceeds 95 percent of capacity, the Parole Board and DOC must "implement" the preparole program "until such time as the [prison] population is reduced to ninety-two and one-half percent (92 1/2 %) of capacity." *See* Okla. Stat. § 365. The plain language and obvious intent of this provision is that State authorities must cease releasing prisoners on preparole status when the prison population is reduced to 92 1/2 percent of capacity. Nothing in either the statute or the implementing regulation indicates that an individual preparolee is to be *returned* to prison when and if the prison population drops; and if the statute did so provide, that would present a serious problem of substantive due process. The liberty guaranteed by the Due Process Clause "'includes a freedom from all substantial arbitrary impositions and purposeless restraints.'" *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (citation omitted). It is not

[66] If the Oklahoma statute in fact provided what the State earlier claimed in this case -- namely, that the Governor's denial of parole disqualified an individual from preparole -- this case might be different. The argument could then be made that preparole resembled a furlough that would definitely end upon the Governor's denial of parole. The record in this case, however, does not support that characterization. If there were any significant ambiguity in that regard, the proper course would not be to resolve the doubt in the State's favor, but rather to remand for the evidentiary hearing that Mr. Harper was denied.

apparent that the State could have *any* legitimate interest in returning to prison a model preparolee, perhaps after many years at liberty, simply because a prison bed became available. However, that issue is not presented here; Oklahoma's law does not permit the interpretation the State suggests, and there is no evidence that the State itself has ever returned a preparolee to prison on this ground.

B. The State's Newly-Asserted Claim That It May Revoke Preparole "For Any Reason or No Reason" Is Unsupported By the Record and Is Incompatible With Substantive Due Process

Unable to defend its earlier stance that parole denial *disqualifies* an individual for preparole, the State now asserts that corrections officials have the authority to revoke preparole, not only if the Governor denies parole, but "for any reason or no reason." If the Oklahoma statute purported to confer any such unlimited authority on state officials, this case would present the question whether the States could circumvent *Morrissey* simply by amending their parole laws to provide that parole may be revoked "for any reason or no reason" or whether the Due Process Clause would forbid such a result.

However, that question is not presented by this case: the Oklahoma statute does *not* purport to confer any such limitless discretion on state officials who administer the program. As discussed in Point II.A., *supra*, the Oklahoma legislature created a conditional release program which differs from the "parole" described in *Morrissey v. Brewer* in little more than name. It is implicit in the statutory scheme that the conditional freedom the State restored to the prisoner will *not* be revoked "for any reason or no reason," but only if the preparolee has done *something* to forfeit the conditional freedom the State restored to him.

In the absence of an explicit statutory grant of authority to revoke preparole "for any reason or no reason," the issue is the more narrow one of whether correctional officials can take it upon themselves to revoke conditional release status "for any reason or no reason," consistent with substantive due process. The answer to this question is that they cannot. A person conditionally released from prison has a constitutionally protected right not to be arbitrarily returned to prison. *See supra* Point II.A. The Due Process Clause imposes substantive as well as procedural limits on the State's authority to revoke this conditional liberty. *See Black v. Romano*, 471 U.S. 606, 610 (1985) (dictum) (probation); *Bearden v. Georgia*, 461 U.S. 660, 665-66, 668-69 (1983) (trial court's automatic revocation of probation for the probationer's failure to pay the imposed fine and restitution was "fundamentally unfair," in the absence of evidence and findings that the defendant was somehow responsible for the failure or that alternative means of punishment were inadequate); *Douglas v. Buder*, 412 U.S. 430 (1973)(*per curiam*) (substantive violation of due process where state court revoked probation with no evidence that the probationer had violated probation).[67]

State action or regulations that burden the exercise of a fundamental constitutional right will be held to offend the Due Process Clause unless the State's action is "generally necessary" to serve a legitimate government interest; there must be a "close fit" between the challenged regulation and the interest it purports to serve. *See Thornburgh v. Abbott*,

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[67] Justice O'Connor, delivering the opinion for a unanimous Court in *Bearden v. Georgia*, stated that the probationer's "lack of fault provides a substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate." *Bearden*, 461 U.S. at 669 (quoting *Gagnon v. Scarpelli*, 411 U.S. at 790 (internal quotation marks omitted)).

490 U.S. 401, 411, 413 (1989).[68] Accordingly, the State must show that revoking Mr. Harper's preparole status without a hearing and returning him to prison *merely* because the Governor denied parole -- or "for any reason or no reason" -- was "generally necessary" to further a legitimate government interest.

The State has shown no such thing. In fact, the State has not met even the exceedingly deferential test of *Turner v. Safley*, 482 U.S. 78, 89 (1987), which applies in cases where the exercise of a fundamental constitutional right can reasonably be expected to present a danger to the community *inside* the prison. Under *Turner*, there must at least be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (citation omitted). There is no such connection here. "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.[69]

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[68] This standard applies even in the prison context, in cases where the exercise of the fundamental constitutional right "cannot reasonably be expected to present a danger to the community *inside* the prison." *Thornburgh v. Abbott*, 490 U.S. at 411-412. This is the applicable standard here, since the exercise of the preparolee's liberty does not take place "[i]n the volatile prison environment, [where] it is essential that prison officials be given broad discretion to prevent [] disorder." *Id.* at 413. Hence, it "[does] not, by its very nature, pose a serious threat to prison order and security," *id.* at 411 (explaining *Procunier v. Martinez*, 416 U.S. 396 (1974)). *See also Morrissey*, 408 U.S. at 485.

[69] Under *Turner*, a second factor in determining reasonableness is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Here, there is obviously no alternative. As to "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally[,]" there can be no negative

The State's interest in implementing release programs to relieve a prison overcrowding crisis is indisputably a legitimate one; however, the State does not explain how or why it is "rationally related" to this interest, let alone "generally necessary" to it, to return to the State's overcrowded prisons a model preparolee, who has obeyed all the rules and conditions of his release, and who has given parole officials no reason to believe that his continued release would endanger the community or his own chances for successful rehabilitation.[70]

Amici attempt to fill this void, suggesting that "even though Mr. Harper did not violate the rules of the program, the prison officials may have determined that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." (Br. of Amici Curiae at 9).[71] But the State of Oklahoma has never

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"ripple effect" on inmates, guards, or prison resources, from *not* returning to prison a model preparolee. *Id.*

[70] Additional evidence that the policy is arbitrary is provided in the State's evolving explanation for returning Mr. Harper to prison without any hearing at all. The reason the State originally gave for revoking Mr. Harper's preparole was that the Governor's rejection of the Parole Board's parole recommendation automatically made Mr. Harper "ineligible" for preparole and thus, there was no need for a hearing since there was no fact to determine. This claim turned out to be contradicted by the State's own regulations. *See supra* Statement of the Case at 7-9. The State now claims that it has the authority to return a preparolee to prison "for any reason or no reason."

[71] There is no statutory or regulatory presumption in Oklahoma that parole denial makes a preparolee susceptible to flight; to the contrary, Parole Board regulations provide that in cases where the Governor denies parole the preparolee is to retain his conditional liberty, and remain in the community in preparole status, unless he is thereafter "classified to a higher security level after due process." Most preparolees are permitted

suggested that it revoked Mr. Harper's preparole because it "determin[ed] that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." The State should not be permitted to raise such a claim in Mr. Harper's case, so late in the day. However, if this were the basis on which preparole was actually revoked in Mr. Harper's case, then Mr. Harper ought to have had notice of this basis, and an opportunity to address it at a *Morrissey*-style hearing. *See infra* Point II.C.

C. A Morrissey-Style Hearing Is Required

To determine what procedural protections the Constitution requires in a particular case, the Court weighs the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The standard set forth in *Mathews* is fully applicable in the prison context. *See Washington v. Harper*, 494 U.S. 210, 229 (1990). "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. at 481). The same rights and interests are at stake in this case as in the revocation of parole, and therefore a *Morrissey*-style hearing is appropriate.

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to remain in the community after a denial of parole by the Governor. *See supra* Statement of the Case at 4.

1. The Private Interest

The private interest that will be affected is the individual's interest in not having his conditional freedom unjustifiably taken away. There is scarcely any other private interest so significant. The revocation of conditional freedom is "an immediate disaster" for the individual returned to prison. *Wolff v. McDonnell*, 418 U.S. at 560-561 (discussing parole). Revocation proceedings determine whether the person conditionally released "will be free or in prison, a matter of obvious great moment to him." *Id.* at 560. This private interest is entitled to added weight, since it coincides with interests of the State. In *Gagnon v. Scarpelli*, the Court found that

> [b]oth the probationer or the parolee and the State have interests in the accurate finding of fact and the informed use of discretion -- the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785. *See also Wolff v. McDonnell*, 418 U.S. at 561 (revocation decision "based on an accurate assessment of the facts is a critical matter to the State as well as the parolee.") Similarly, unjustifiably returning a preparolee to prison thwarts the statutory purpose of relieving prison overcrowding by conditionally releasing to the community prisoners who can live as responsible and self-reliant members of society.

2. The Value of a Hearing

The risk of needless, purposeless revocation is enormous when, as in Mr. Harper's case, the State holds no hearing at all.[72] The State argues that there is no value in a preparole revocation hearing in cases where preparole is revoked merely because the Governor did not approve parole; for "[where] there is no 'claimed violation,'" (Pet'r Br. at 22), "there is no factual question." (Pet'r Br. at 23). According to the State, "'verified facts' and 'accurate knowledge of the parolee's behavior' are not necessary in making the decision of whether to transfer an inmate to a higher level of security" (*i.e.*, return the preparolee to prison), because "[s]uch a determination is purely predictive and discretionary" and "would not be assisted by any type of adversary proceeding." (Pet'r Br. at 23.)

In fact, however, the value of procedural safeguards is as great here as in revocation of parole or probation. That a revocation decision may be "predictive and discretionary" does not mean that it can be arbitrary. It must be an individualized determination of a person's suitability to remain at liberty, informed by consideration of the relevant, ascertainable facts.

The decision to revoke preparole is neither more nor less "predictive and discretionary" than the decision to revoke parole. In *Morrissey*, the Court pointed out that the "enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to

[72] Procedures promulgated after Mr. Harper was returned to prison provide for some sort of "due process" review before a preparolee may be returned to prison on the basis of parole denial, *see supra* Statement of the Case at 9 n.28, but there is no evidence in the record as to what that review entails.

serve out the balance of his sentence if he fails to abide by the rules." 408 U.S. at 478-79. The Court concluded that "implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." *Id.* at 479. That same notion is implicit in preparole, for the same reasons: in the words of the Oklahoma Parole Board, "the conditions [of preparole] are similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and returned to prison."[73]

The reality is, as the *Morrissey* Court recognized, that even in the case of parole, parole officers typically are accorded broad discretion as to whether or not to revoke parole; that discretion is "inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence." 408 U.S. at 479. Whether or not a clear-cut violation of a black-letter rule is charged, the fundamental issue that concerns the parole officer is whether or not the parolee's or preparolee's conduct in the community shows he is able to function as a responsible member of society, and thus whether or not he should be permitted to retain his conditional freedom.[74]

In *Morrissey*, as here, the State argued that hearings should not be required because "non-legal, non-adversary considerations" were often the determinative factors in making

[73] Resp't App. A at 9a, Parole Board Brochure (1989).

[74] Thus, the Court need not reach the question of whether something less than a violation of the conditions of release will justify revocation of preparole.

a parole revocation decision.[75] This Court rejected the argument, holding that "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey*, 408 U.S. at 484. Similarly, although "[t]he decision to revoke probation is generally predictive and subjective in nature," *Black v. Romano*, 471 U.S. at 613 (1985) (citing *Gagnon v. Scarpelli*, 411 U.S. at 787), the Court requires *Morrissey*-style hearings for probation revocation because "[b]oth the probationer . . . and the State have interests in the accurate finding of fact and the informed use of discretion." *Gagnon*, 411 U.S. at 785. Justice O'Connor, delivering the opinion of the Court in *Black v. Romano*, explained that when a statute confers discretion on a factfinder to revoke conditional release status, the exercise of that discretion must be informed by the facts:

> Where such discretion exists . . . , the parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.

Black v. Romano, 471 U.S. at 612.[76]

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[75] *See* Resp't Br. (No. 71-5103) filed in *Morrissey v. Brewer* (at 11 n.2); *see also Morrissey v. Brewer*, 408 U.S. at 475.

[76] *Compare Schall v. Martin*, 467 U.S. 253, 277-79 (1984) (state law authorizing pretrial detention of an accused juvenile delinquent, based on a finding of either a "serious risk" that the juvenile may commit a criminal act before his next court appearance, or a "substantial probability" of flight, did not violate the Due Process Clause, since the procedural safeguards the statute afforded, including notice, a hearing, a statement of facts and reasons given prior to detention, a formal probable cause hearing, a fact-finding hearing, and a stenographic record of the initial

Here, the State treated the Governor's decision to deny Mr. Harper parole as conclusive proof that Mr. Harper was unfit for preparole (even though neither statute nor agency regulations required any such result, and even though the Governor has no statutory role at all in preparole decisions). The Parole Board declined to hear any evidence of Mr. Harper's conduct while he was at liberty in the community. It refused him any opportunity to testify and to present testimony from his parole officer, employer, co-workers, family, friends, and other members of the community, about his conduct and accomplishments during his months at liberty, to show that revocation was not warranted in his case, and to rebut any erroneous facts which may have influenced the decision to revoke. Further, the Board failed to explain the reason for its decision, apart from the bare fact of the Governor's parole denial, thus leaving no basis for review to determine if the decision to revoke rested on permissible grounds supported by the evidence. Consequently, the decision that Mr. Harper was no longer fit for preparole was not based on verified facts, and the exercise of discretion to return him to prison was not informed by knowledge of his behavior on preparole. *See Morrissey*, 408 U.S. at 484.

3. The State's Interest

The State's interests in avoiding revocation hearings for preparolees are minimal. Revocation proceedings do not involve the problems inherent in "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, 408 U.S. at 483. In *Wolff v. McDonnell*, 418 U.S. at 561-62,

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appearance as a basis for review of individual cases, provided "sufficient protection against erroneous and unnecessary deprivations of liberty." *Id.* at 274 (citing *Mathews v. Eldridge*, 424 U.S. at 335).

the Court elaborated on the "very different stake the State has in the structure and content of the prison disciplinary hearing" in contrast to a parole revocation hearing. Prison disciplinary proceedings "take place in a closed, tightly controlled environment" where "[g]uards and inmates co-exist in direct and intimate contact" and "[t]ension between them is unremitting;" whereas:

> the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses -- at least no more so than in the case of the ordinary criminal trial.

Id. at 561.

Although the State does not articulate any particular interest in revoking preparole with no hearing at all, the Amici predict that a "determination that a liberty interest is created" by release on preparole "would cause many of the Amici States to eliminate such programs due to the burden of providing a hearing pursuant to *Morrissey v. Brewer*;" would "discourage states from experimenting with new procedures or programs utilized to eliminate the overcrowding dilemma;" and would "impose an enormous financial burden on the Amici States and restrict the ability of prison administrators to manage their correctional facilities." (Br. of Amici Curiae at 2-3.) These fears are surely greatly exaggerated; particularly because the costs and burdens associated with holding a hearing to determine whether the State has a legitimate interest in returning an individual to prison cannot possibly compare to the extremely heavy costs and burden of actually incarcerating him. Indeed, since the cost of incarcerating a person is more than fifteen times greater than the cost of supervising him on parole, it is unlikely that the

States will dispense with conditional release programs in order to escape the burden of revocation hearings.[77]

In *Morrissey*, the State predicted, and the Court of Appeals agreed, that if adversary hearings were required for parole revocation, the function of the parole board "would be aborted," and the parole board "would be more reluctant to grant parole in the first instance." 408 U.S. at 475. This Court rejected the claim that providing a hearing "would be administratively intolerable," and concluded that "[a] simple factual hearing [would] not interfere with the exercise of discretion." *Id.* at 483. After a quarter of a century, it is safe to say that requiring revocation hearings has not discouraged the States from implementing parole systems or granting parole.[78] There is no reason to suppose that the dark fears expressed by the Amici, about the disastrous results of requiring preparole revocation hearings, are not as exaggerated as the fears expressed by the State in *Morrissey*.

CONCLUSION

The Court lacks jurisdiction; therefore the writ of certiorari should be dismissed as improvidently granted and the case should be remanded to the Tenth Circuit to reinstate its mandate to the District Court. If the Court decides that it

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[77] It costs $22,000 per year in operating expenses to incarcerate, and an overall average of $1325 per year to supervise on parole. C. Camp & G. Camp, The Corrections Yearbook -- Adult Corrections at 1, 49 (1995); The Corrections Yearbook -- Probation and Parole at 43 (1995).

[78] In the five-year period ending January 1, 1995, the number of adults on active parole supervision in the United States increased from 545,804 to 664,404. *See* C. Camp and G. Camp, The Corrections Yearbook Probation & Parole at 30-31 (1990); The Corrections Yearbook -- Probation & Parole at 47-48 (1995).

has jurisdiction, it should affirm the decision of the Tenth Circuit.

Respectfully submitted,

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September, 1996

No. 95-1598

In The

Supreme Court of the United States

October Term, 1995

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

APPENDIX TO BRIEF OF RESPONDENT

TABLE OF CONTENTS

Appendix		Page
A	Pardon and Parole Board Brochure (1989)	1a
B	Pardon and Parole Board Brochure (1992)	15a
C	Parole Fact Sheet (effective 6/91)	27a
D	Rules and Conditions Pre-Parole Conditional Supervision/Electronic Monitoring/ Specialized Supervision/House Arrest (effective 6/93)	31a
E	DOC Policy and Operations Manual Procedure 0P-160120	35a
F	Pardon and Parole Board Procedure No. 004-11 (effective 4/1/94)	36a
G	Daily Oklahoman May 29, 1996	40a
H	Pardon and Parole Board Procedure 004-11 (effective 9/1/89)	43a
I	DOC Interim Pre-Parole Conditional Supervision Revocation OP-060208	51a
J	Okla. Stat. tit. 57, §365	83a
K	Okla Stat. tit. 57, §332.7	86a
L	Okla. Stat. tit. 57, §332.8	88a
M	Okla. Stat. tit. 57, §350	90a
N	Okla. Stat. tit. 57, §512	91a

APPENDIX A

1989

STATE OF OKLAHOMA

PARDON AND PAROLE
BOARD

Pardon and Parole Board
4040 North Lincoln Blvd. Suite 219
Oklahoma City, Oklahoma 73105

The Pardon and Parole Board is a constitutionally - created body charged with making clemency recommendations concerning convicted adult felons. Their recommendations are subject to approval by the Governor. There are five members who serve four-year terms coterminous with the Governor. Three members are appointed by the Governor, one member by the State Supreme Court, and one member by the Court of Criminal Appeals. There are no statutory requirements for qualifications or background, so the members come from all walks of life. The members are not employees of the state, and they serve part-time. Any attorney who serves on the Board is not allowed to practice criminal law nor be part of a law firm which practices criminal law during the term of service.

AGENCY STAFF

There are approximately 30 members of the support staff, full-time employees of the State of Oklahoma. These employees administer the daily operation of the agency, prepare reports to the Board and answer inquiries from public officials, the news media and the general public.

The agency is headed by the Executive Director, who is responsible for the overall operation of the agency. The Executive Director is assisted by the Deputy Director. The agency also has a General Counsel, who addresses legal issues facing the agency.

Reports and investigations for the Pardon and Parole Board on individual candidates for parole, pre-parole and commutation are compiled by investigators. These investigators have previous experience in the correctional field, and are assigned to correctional facilities throughout the state.

MEETINGS

The Pardon and Parole Board meets once each month to consider candidates for parole, commutation of sentence, Pre-Parole Conditional Supervision and pardon. The meetings are generally held over a two-day period, on Friday and Saturday of the designated week. Meetings are open to the public, and are conducted in accordance with the Open Meeting Act. A schedule of Board meetings and dates for specific meetings can be obtained by writing to the address listed at the end of this brochure.

PAROLE

How do inmates come up for parole?

Inmates are assigned parole docket dates in several ways. The most common is one-third of the sentence. By state law, all inmates must be considered for parole by the time they have served one-third (except escapees, inmates involved in riots, and certain robbery offenders).

One-third dates are calculated on a maximum sentence length of 45 years. Those with sentences in excess of 45 years (including life sentences) are calculated as 45-year sentences for docketing purposes. Therefore, the maximum one-third date by policy is 15 years.

Another docket reason is the presumptive parole date (PPD). The PPD was established in an effort to compensate for sentencing disparities for some offenders in prison for the first or second time. The PPD was derived by analyzing the average time served for a given offense type and determining a number of months to be served before parole consideration. Approximately 15 percent of the inmates considered for parole are considered based upon the PPD. This date can be aggravated (set off) if information is received from official

sources which demonstrates that the crime is more serious than the offense title would [text missing in original].

A parole matrix is used in the determination of the PPD. Offense titles are placed in categories from A through D, with Category A offenses being the most serious. The category of offense and the assessed risk level determine what the PPD will be. Some examples are:

Category A - Kidnapping, Shooting With Intent to Kill, Manslaughter First Degree.

Category B - Robbery With Firearms, Distribution of Controlled Dangerous Substance, Burglary First Degree.

Category C - Embezzlement, Burglary Second Degree, Possession of Controlled Dangerous Substance.

Category D - False and Bogus Checks, Larceny of Merchandise From a Retailer, Grand Larceny.

Inmates serving time for murder first degree and sex offenses (excluding indecent exposure), and those with Category A offenses scoring high risk do not receive presumptive parole dates. These inmates are considered at one-third of the sentence by Board policy.

Unless an inmate must serve a mandatory term by law before parole, he or she is docketed at the earlier of the PPD or one-third. The docket date is set for two months prior to the actual one-third date or PPD, to allow time for the Governor's action. The docket date is not changed by time credits granted by the Department of Corrections.

If an inmate is not required by law to serve a certain period of time before consideration, a member of the Pardon and Parole Board may place the inmate on an earlier docket at his or her discretion.

Some inmates do not receive parole docket dates. Examples are inmates with death sentences, those serving a sentence of life without parole, those with less than 120 days left to serve and inmates on commutation dockets (discussed later in this brochure).

Consideration and recommendations

The Board considers many factors when deciding on a clemency recommendation. Among these are the nature of the offense, prior criminal history, prior history under supervision, the inmate's institutional record, program participation, and input from law enforcement officials, victims of the crime, victims' families and private citizens.

Not all inmates considered for parole personally appear before the Board. About half are considered by jacket review, a review of the investigator's report and, if necessary, the inmate's file.

There are standard conditions which each inmate placed on parole must follow. These include reporting to the parole officer promptly, reporting to the officer either in person or in writing (whichever the officer requires), reporting changes in address, employment or marital status, not leaving the state without prior permission, not associating with persons with prior criminal records, obeying all local, state and federal laws, and not carrying or possessing firearms.

The Board can recommend stipulations in addition to the standard conditions of parole. Examples of stipulations are

restitution, completion of vocational training and educational Programs, and participation in drug and alcohol treatment programs.

In order to be recommended for parole, an inmate must receive favorable votes from three Board members (a simple majority).

An inmate cannot be paroled by the Governor without first being recommended by the Pardon and Parole Board.

An inmate can waive (decline) parole consideration by signing a waiver form.

Parole in Absentia

A law passed during the 1987 session of the Oklahoma Legislature authorized the Board to consider inmates for parole who have Oklahoma convictions and are in prison in other state systems and the Federal Bureau of Prisons. This law is the basis for the parole in absentia program. This program was implemented in an effort to save the state the expense of picking up inmates who are suitable parole candidates and bringing them back to Oklahoma after the completion of the other system's sentence.

To qualify, an inmate must have an Oklahoma felony conviction being served concurrently with the sentence(s) from the other system. The inmate must apply for consideration by submitting a completed application form and other requested documents and information. Docket dates are determined in the same manner as for other paroles, based upon the date the inmate began serving the Oklahoma sentence.

Parole supervision

Inmates who are paroled are supervised by probation and parole officers of the Department at Corrections. If an inmate does not abide by the conditions and stipulations of parole, the parole can be revoked by the Governor and the inmate can be returned to prison.

Why parole?

The advantages of parole over other types of release are many. Offenders receive support and assistance in making the transition back into society. Community resources are available, and a parole officer can provide assistance. Also, the interests of the public are protected. Parole decisions are made in open meetings and citizens have the opportunity to support or protest the release before it occurs. Law enforcement officers in the area of residence are notified when an inmate is released on parole, and a parole officer monitors compliance with rules and conditions of parole.

Parole also has a three-level screening process. The investigator interviews the inmate and makes a recommendation for or against parole. The Pardon and Parole Board members review the investigation and recommendation, and make a recommendation of their own. If the inmate is recommended for parole, the Governor reviews the Board's recommendation and makes the final decision. The Board recommends an average of one inmate out of three considered for parole.

Other types of release

The vast majority of released inmates go into the community without supervision or monitoring. This is

primarily due to time credits awarded by the Department of Corrections.

Cap credits are applied to the sentences of every inmate who meets the eligibility criteria each time the law is invoked. The net result is that each inmate who gets these credits has 60 days less to serve each time they are applied.

Earned credits are awarded for work or program assignments. In addition, inmates can earn lump-sum credit awards of up to 120 days for completing certain programs. The vast majority of inmates released by earned credits and cap credits are not supervised after release.

One early release program, the Department of Corrections' House Arrest program, is administered completely by that agency, which has total control over how many inmates and which ones are released. The house arrest population level is frequently boosted during periods of especially high prison population.

Summary

Parole is a discretionary release, where inmates are considered on a case-by-case basis without regard for prison population levels. Parole was not intended to be a population control mechanism, and is not used as such in Oklahoma.

Parole is preferable over less discriminate release programs because more people are involved in the decision, more factors are considered in making the decision, the decision is not made with population reduction as the primary goal, and the inmate is not released into the community unsupervised.

PRE-PAROLE CONDITIONAL SUPERVISION

The Pre-Parole Conditional Supervision program (PPCS) was developed as an alternative to the house arrest program operated by the Department of Corrections. It was created by statute in the 1988 session of the Oklahoma Legislature. To be eligible for PPCS, an inmate must have served at least 15 percent of his or her sentence, and be within one year of the scheduled parole docket date.

PPCS inmates are supervised in the community by probation and parole officers of the Department of Corrections. The conditions are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she elects not to be considered for parole. All pre-paroles are decided by jacket review. Governor approval is not required for PPCS.

COMMUTATION

The special commutation program was developed at the request of Governor Henry Bellmon to help alleviate the overcrowding situation in the Department of Corrections. To be eligible for commutation, an inmate must be in prison for the first or second time, be serving a sentence of less than five years, and not have any cases or detainers for violent crimes to be served during the current incarceration. Docket dates are determined by sentence length.

If an inmate is commuted, the sentence is modified to immediate release from prison. Inmates who are eligible for commutation must choose between commutation and parole consideration, and are not considered for both. All

commutations are decided by jacket review. The Governor must approve commutations. The Governor commutes sentences by signing a proclamation which includes a list of the inmates whose sentences are to be commuted. This usually takes place approximately one week after the Board meeting.

PARDON

A pardon is a form of clemency for a person who has already been released from prison or has completed a suspended sentence. To be eligible, a person must have been convicted of a violation of Oklahoma law and finished serving all cases (or, in the case of a lengthy sentence, completed at least five years under supervision). The applicant cannot have any pending charges, or have been considered for a pardon within the past six months.

Pre-pardon investigations are conducted by probation and parole officers of the Department of Corrections. The Pardon and Parole Board staff processes applications, reviews the final reports and tracks deadlines.

Effects of a pardon

A pardon restores certain rights (such as running for public office or serving on a jury). It may also have a positive impact on a licensing agency or prospective employer which normally does not consider convicted felons, or does so only on a case-by-case basis. Under Oklahoma law, a pardon does not remove convictions from a felony record, and does not prevent their use in the determination of punishment if the person is later convicted of another felony. A pardon also does not restore the right to carry firearms.

FACTS AND INFORMATION

The Pardon and Parole Board is an independent state agency. It is not part of the Department of Corrections or any other state agency.

The Pardon and Parole Board does not supervise parolees or probationers. Those services are provided by the Division of Probation and Parole of the Department of Corrections.

Of the inmates released from prison each year, only a small percentage are released on parole. The majority discharge without supervision due to time credits granted by the Department of Corrections.

Parole recommendation rates are lower than in the past. There are several reasons for this. A slight majority of the inmates considered for parole are serving time for violent crimes. In the past, a large number of non-violent offenders were considered. Alternative release programs which target non-violent offenders are also partially responsible for this trend. Many of the more suitable parole candidates are waiving consideration, electing instead to participate in programs like house arrest, or to discharge without supervision due to earned credits and cap credits.

Paroles are not automatic. The fact that an inmate is being considered does not mean that he or she will be released. The Board is required by law to consider inmates for parole, but is not required to recommend them. Inmates do not have a right to parole.

The Governor cannot parole, pardon or commute the sentence of an offender unless that person has been recommended for clemency by the Pardon and Parole Board.

Any citizen can support or protest the parole, pardon or commutation of an inmate. This can be done either by sending a letter to the Pardon and Parole Board office in Oklahoma City or appearing in person at the Board meeting.

Written protests are confidential, and are not revealed to anyone outside the agency. If a protestor appears in person at a meeting of the Pardon and Parole Board, great care is taken to ensure that the protestor and the inmate do no [sic] come in direct contact with one another. Anyone attending a Board meeting should be aware, however, that the meetings are open, and the confidentiality of any verbal statement cannot be guaranteed. The general public and news media attend the meetings, and the inmate may become aware of verbal statements made to the Board.

The information received by the Pardon and Parole Board does not normally contain the name and address of the victim of a crime. Due to this fact, the Board is usually unable to locate and notify victims in advance of an inmate's parole hearing unless that person sends a letter requesting to be notified in writing. Any person can request to be notified in advance when an inmate will be considered for parole by sending a letter to the Pardon and Parole Board office in Oklahoma City.

If an inmate is not required by law to serve a mandatory term before parole, each Board member has the authority to place that inmate on an earlier parole docket. Only members of the Pardon and Parole Board can do this. It cannot be done by the Governor, a congressman, a state legislator, an attorney or any member of the administrative staff

Once an inmate's parole docket date has been calculated, it does not change unless new information affecting time calculation is received or a Board member places the inmate

on an earlier docket. Earned credits and cap credits have no effect on the assigned docket date. The Pardon and Parole Board has no control over time credits granted to inmates.

District attorneys are required by law to provide a written version of the offense to the Board on sentences in excess of two years. These versions are included in the investigator's reports when available, and are considered by Board members when making clemency decisions.

Each district attorney receives a copy of the monthly docket prior to each month's meeting. All candidates for parole, commutation, pre-parole and pardon for that month are listed on the docket. District attorneys, county sheriffs and local police departments are also notified in writing of any inmate released on parole who either was convicted in or will reside in their area. District attorneys are also notified of persons who are pardoned.

The Pardon and Parole Board does not play any role in the assignment of security levels of inmates. The Board does not assign inmates to minimum or community security or house arrest. These decisions are made by the Department of Corrections.

The members of the Pardon and Parole Board do not maintain offices. Questions can be answered by staff members in the Administrative Office in Oklahoma City. Mail to Board members can be sent either to the Oklahoma City office or to the post office box each member has obtained for mail regarding parole matters.

THIS PUBLICATION, PRINTED BY THE OFFICE OF PUBLIC AFFAIRS, CENTRAL PRINTING DIVISION, IS ISSUED BY THE PARDON AND PAROLE BOARD AS AUTHORIZED BY RAY H. PAGE, EXECUTIVE DIRECTOR. A TOTAL OF 3,000 COPIES HAVE BEEN PREPARED AT A COST OF $1120.00. COPIES HAVE BEEN DEPOSITED WITH THE PUBLICATIONS CLEARINGHOUSE OF THE OKLAHOMA DEPARTMENT OF LIBRARIES.

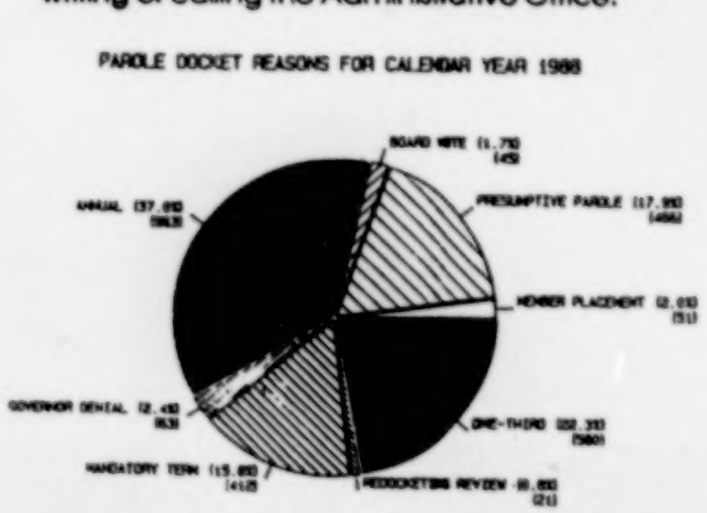
Administrative Office

Pardon and Parole Board
4040 North Lincoln Boulevard
Suite 219
Oklahoma City, OK 73105
Phone: (405) 427-8601

Office hours 8:00 AM to 5:00 PM
Monday thru Friday
(except state holidays)

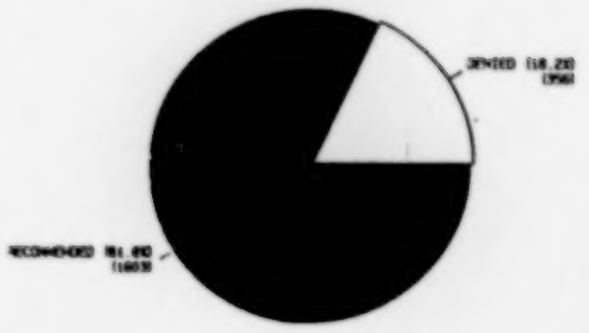
A listing of Board members' names and mailing addresses can be obtained by writing or calling the Administrative Office.

PAROLE DOCKET REASONS FOR CALENDAR YEAR 1988

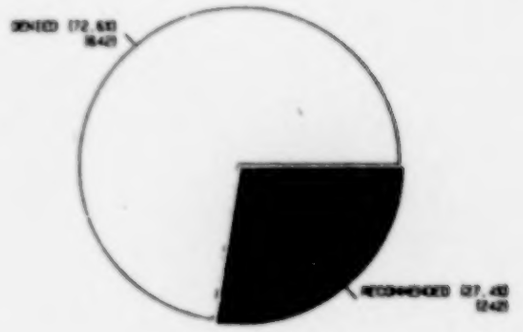


PAROLE RECOMMENDATIONS FOR CALENDAR YEAR 1988

COMMUTATION RECOMMENDATIONS FOR CALENDAR YEAR 1988



PRE-PAROLE RECOMMENDATIONS FOR CALENDAR YEAR 1988



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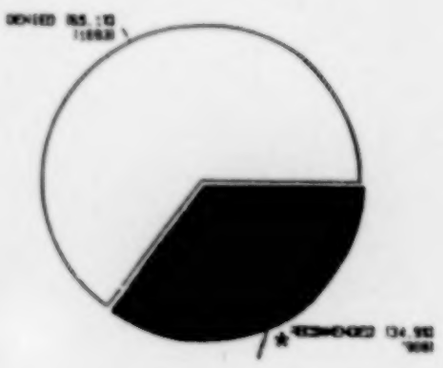

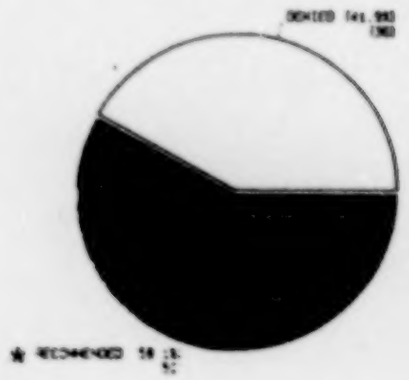

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APPENDIX B

1992

STATE OF OKLAHOMA PARDON AND PAROLE BOARD

PARDON AND PAROLE BOARD

The Pardon and Parole Board is a constitutionally-created body charged with making clemency recommendations concerning convicted adult felons. Their recommendations are subject to approval by the Governor (with the exception of pre-parole conditional supervision, described below). The five members serve four-year terms coterminous with the Governor. Three members are appointed by the Governor, one member by the State Supreme Court, and one member by the Court of Criminal Appeals. There are no statutory qualifications, so the members come from all walks of life. The members serve part-time, and are not state employees. Any attorney who serves on the Board is prohibited from practicing criminal law or being part of a law firm which practices criminal law during the term of service.

AGENCY STAFF

The agency has approximately 40 employees. These employees administer the daily operation of the agency, prepare reports to the Board and answer inquiries from public officials, the news media and the general public. The agency is headed by the Executive Director, who is responsible for the overall operation of the agency. The Executive Director is assisted by the Deputy Director. The General Counsel addresses legal issues facing the agency.

Reports and investigations on individual candidates for parole and preparole are compiled by investigators. These investigators have previous experience in corrections, and are assigned to correctional facilities throughout the state.

MEETINGS

The Pardon and Parole Board meets monthly to consider candidates for parole, pre-parole and pardon. The meetings are normally held over a three-day period beginning on Wednesday of the designated week. Meetings are open to the public, and are conducted in accordance with the Open Meeting Act. Meeting information may be obtained by writing to or calling the office listed at the end of this brochure.

How are inmates scheduled for parole consideration?

Parole docket dates are calculated in several ways. The most common initial docket is one-third of the sentence. By state law, each inmate must be considered for parole no later than one-third of the sentence (except escapees, inmates involved in riots, and certain robbery and racketeering offenders). Approximately 45 percent of the inmates considered for parole in 1991 were considered based upon one-third of the sentence or a mandatory term by state statute. The Board recommended 32.2 percent of the inmates considered on regular parole dockets in 1991.

One-third dates are calculated on a maximum sentence length of 45 years. Those with sentences in excess of 45 years (including life sentences) are calculated as 45-year sentences for docketing purposes. The maximum one-third date by policy is 15 years.

Inmates serving time for non-violent offenses and some violent offenses of lesser severity are assigned 15/12 (15 percent plus 12 months) dates. Inmates with severe violent offenses receive 15/24 (15 percent plus 24 months) dates. Examples are:

Violent offenses (15/24) - Kidnapping, Shooting With Intent to Kill, Manslaughter First Degree.

Violent/drug transaction offenses (15/12) - Robbery With Firearms, Distribution of

Controlled Dangerous Substance, Burglary First Degree.

Non-violent offenses (15/12) - Embezzlement, False and Bogus Checks, Grand Larceny.

Inmates serving time for murder first degree and sex offenses other than indecent exposure do not receive presumptive parole dates or 15/24 dates (whichever applies). These inmates are considered at one-third of the sentence by Board policy.

The 15/12 and 15/24 dates replaced the presumptive parole date (described below) effective September 1, 1989. This change was made in conjunction with the phasing out of the Department of Corrections' house arrest program. The goal was to make inmates eligible for placement in the pre-parole program at approximately the same time that they would have been eligible for house arrest.

The presumptive parole date (PPD) was established in an effort to compensate for sentencing disparities for some offenders in prison for the first or second time. The PPD matrix was derived by analyzing the average time served for different types of offenses. The PPD could be administratively modified if official information was received which demonstrated that the crime was more serious than the offense title would have indicated. The PPD applies to offenders who were received or rebilled to a consecutive case before September 1, 1989.

Unless state law requires an inmate to serve a mandatory term before parole, he or she is initially docketed at the earlier of the PPD, 15/12 or 15/24 (whichever applies), or one-third. The docket date is set for two months prior to the actual eligibility date to allow time for the Governor's action.

If an inmate is not required by law to serve a specified period of time before consideration, the Pardon and Parole Board may modify the inmate's docket date. Such

modifications are discretionary, and a majority vote is required. The Board may also vote not to reconsider parole on a case for a period of up to five years, or to reconsider a case early (the normal period is one year from denial). Board modifications accounted for 16.3 percent of the inmates considered for parole in 1991.

Some inmates do not receive parole docket dates. Examples are inmates with death sentences, those serving a sentence of life without parole, those with less than 120 days left to serve and inmates serving parole violation cases with less than 28 months to serve.

Consideration and recommendations

The Board considers many factors when deciding on clemency. Among these are the nature of the offense, prior criminal history, prior history on probation or parole, institutional record, program participation, and input from law enforcement officials, victims of the crime, victims' families and private citizens.

Not all candidates for parole personally appear before the Board. Many are considered by jacket review, a review of the investigator's report and, if necessary, the inmate's file. The Board also considers input from supporters and protestors who attend the meeting in person.

Each inmate placed under parole supervision must follow certain standard conditions. These include reporting to the parole officer promptly, reporting regularly either in person or in writing (whichever the officer requires), reporting changes in address, employment or marital status, not leaving the state without prior permission, not associating with persons with prior criminal records, obeying all local, state and federal laws, and not carrying or possessing firearms.

The Board can recommend stipulations in addition to the standard conditions of parole. Examples of stipulations are restitution, completion of vocational training and educational

programs, participation in drug and alcohol treatment programs, community service and payment to the Crime Victims' Compensation Fund.

In order to be recommended for parole, and inmate must receive favorable votes from three Board members (a simple majority).

An inmate cannot be paroled by the Governor without first being recommended by the Pardons and Parole Board.

An inmate may decline parole consideration by signing a waiver form.

The Board may hold clemency hearings on death penalty cases. These meetings are held at the discretion of the chairman, and are usually conducted only when the executive date is near. Any recommendations for clemency made at such a hearing is subject to approval by the Governor.

Parole in absentia

The parole in absentia program, authorized by statute in 1987, allows inmates serving Oklahoma sentences along with cases in another prison system to be considered for parole without returning to Oklahoma. The program was implemented to save the expense of returning suitable parole candidates to Oklahoma after the completion of the other system's sentence. Inmates must apply for in absentia parole consideration.

The Oklahoma felony conviction must be running concurrently with the sentence(s) from the other system. Docket dates are calculated in the same manner as for other paroles, based upon the date the inmate began serving the Oklahoma sentence.

Parole supervision

Inmates who are paroled are supervised by probation and parole officers of the Department of Corrections. If an

inmate does not abide by the conditions and stipulations of parole, the parole can be revoked by the Governor and the inmate can be returned to prison.

Why parole?

Under parole supervision, offenders receive support and assistance in making the transition from prison to society. Community resources are available, and the supervising officer can provide help in locating and using them. The interests of the public are also protected. Law enforcement officers in the area of residence are notified when an inmate is released on parole, and a parole officer monitors compliance with rules and conditions of parole.

Parole has a three-level screening process. The investigator reviews the file and interviews the inmate, and makes a recommendation for or against parole. The Pardon and Parole Board members review the investigation and recommendation, and make a recommendation of their own. If the inmate is recommended for parole, the Governor reviews the Board's recommendation and makes the final decision.

Emergency time credits (cap credits) are applied to the sentence of each inmate who meets the eligibility criteria each time the law is invoked. The net result is that each inmate who gets these credits has 30 days less to serve each time they are applied.

Earned credits are awarded for work or program assignments. Inmates can also earn achievement credits, lump-sum credit awards of up to 120 days for completing certain programs. The vast majority of inmates released by earned credits and cap credits are not supervised after release.

Parole is a discretionary release. Inmates are considered on a case-by-case basis without regard for prison population levels. Parole was not intended to be used as a population control mechanism, and is not in Oklahoma.

Parole is preferable over less discriminate release programs because more people are involved in the decision, more factors are considered, population reductions is not the primary goal, and the inmate is not released into the community unsupervised.

PRE-PAROLE CONDITIONAL SUPERVISION

The Pre-Parole Conditional Supervision program (PPCS) was created by statute in the 1988 session of the Oklahoma Legislature. To be eligible for PPCS, an inmate must have served at least 15 percent of the sentence, and be within one year of the scheduled parole docket date. Inmates with consecutive cases and detainers are not considered for PPCS. PPCS inmates are supervised in the community by probation and parole officers of the Department of Corrections. The conditions are similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and returned to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she chooses not to be considered for parole. All pre-paroles are decided by jacket review. Governor approval is not required for PPCS. The Board recommended 41.2 percent of the inmates considered for PPCS in 1991.

Mandatory Parole Review Docket

A law passed in the 1989 session of the Oklahoma Legislature created the mandatory parole review docket (MPRD). Under this program, inmates who are serving time for non-violent offenses and are projected to discharge within 15 to 21 months (depending upon sentence length) are considered for parole. Inmates on the MPRD are considered

by jacket review. The Board recommended 62.8 percent of the inmates considered on the MPRD in 1991.

Pardon

A pardon is a form of clemency for a person who has been discharged from prison or has completed a suspended sentence or parole. Applicants must have been convicted of a violation of Oklahoma law and have finished serving all cases or have completed at least five years under supervision. The applicant cannot be in prison or jail, have any pending charges, or have been considered for a pardon within the past six months.

Pre-pardon investigations are conducted by probation and parole officers of the Department of Corrections. The Pardon and Parole Board staff processes applications, reviews the final reports and tracks deadlines.

A pardon restores certain rights (such as running for public office or serving on a jury). It may also have a positive impact on a licensing agency or prospective employer. Under Oklahoma law, a pardon does not remove convictions from a person's record, and does not prevent their use in sentencing if the person is later convicted of another felony. A pardon also does not restore the right to carry firearms. The 1991 approval rate for pardons was 60.0 percent.

PRISON OVERCROWDING

Traditionally, the Pardon and Parole Board played only a minor role in the control of prison population. Unprecedented growth in prison receptions and population forced a change in this regard. A unique joint effort between the Pardon and Parole Board and the Department of Corrections was undertaken in 1989 in an effort to establish a degree of control over the number of inmates in the prison system. The

Prison Population Growth Task Force was created, comprised of staff from both agencies. The task force attempted to address the needs of both the prison system and the citizens of Oklahoma. Ideas were formulated to make the system more efficient by eliminating and combining competing and duplicate programs, streamlining the parole process and recommending sweeping changes in the operations of both agencies. Most of the proposals of the task force were implemented.

FACTS AND INFORMATION

The Pardon and Parole Board is an independent state agency. It is not part of the Department of Corrections or any other state agency.

The Pardon and Parole Board does not supervise parolees or probationers. Those services are provided by the Department of Corrections.

Paroles are not automatic. The fact that an inmate is being considered does not mean that release will occur. The Board is required by law to consider inmates for parole, but is not required to recommend them. Inmates do not have a right to parole.

The Governor cannot parole, pardon or commute the sentence of an offender unless that person has been recommended for clemency by the Pardon and Parole Board.

Any citizen can support or protest the parole, pre-parole or pardon of an inmate. This can be done either by sending a letter to the Pardon and Parole Board office in Oklahoma City or appearing in person at the Board meeting.

Written protests are confidential, and are not revealed to anyone outside the agency. If a protestor appears in person at a meeting of the Pardon and Parole Board, great care is taken to ensure that the protestor and the inmate do not come in direct contact with one another. Anyone attending a Board meeting should be aware, however, that the meetings are

open, and the confidentiality of any verbal statement cannot be guaranteed. The general public and news media attend the meetings, and the inmate may become aware of verbal statements made to the Board.

The Pardon and Parole Board does not normally receive the name and address of crime victims. Due to this fact, the Board is usually unable to locate and notify victims in advance of an inmate's parole hearing unless that person requests to be notified in writing. Any person can request advance notification by sending a letter to the Pardon and Parole Board office in Oklahoma City. A statute passed in 1989 requires the Board to notify crime victims after an inmate has been released on parole.

Once an inmate's parole docket date has been calculated, it is not affected by earned credits or cap credits.

District attorneys are required by law to provide a written version of the offense to the Board on sentences of more than two years. These are included in the investigators' reports when available, and are considered by Board members when making clemency decisions.

Each district attorney receives a copy of the docket prior to each month's meeting. All candidates for parole, pre-parole and pardon for that month are listed on the docket. District attorneys, county sheriffs and local police departments are also notified in writing of any inmate released on parole who either was convicted in or will reside in their area. District attorneys are also notified of persons who are pardoned

The Pardon and Parole Board does not play any role in the assignment of security levels or facility transfers of inmates. These decisions are made by the Department of Corrections.

The members of the Pardon and Parole Board do not maintain offices for Board business. Questions can be answered by staff members in the Administrative Office in Oklahoma City. Mail to Board members can be sent either to

the Oklahoma City office or to the post office box each member maintains for mail regarding parole matters.

Administrative Office

Pardon and Parole Board
4040 North Lincoln Boulevard
Suite 219
Oklahoma City, OK 73105
Phone: (405) 427-8601
Fax: (405) 427-6648

Office hours 8:00 AM to 5:00 PM
Monday-Friday (except state holidays)

APPENDIX C

FORM 005-1-A
(6-91)

PAROLE FACT SHEET

Parole is the conditional release of an inmate from prison, based upon the prisoner's agreement that (s)he will follow certain rules while on parole. To ensure compliance with parole rules, the parolee is monitored by a Probation and Parole Officer until supervision is terminated. If you are recommended for parole by the Pardon and Parole Board and approved by the Governor, you must sign a Parole Certificate agreeing to follow all the rules of parole. If you do not follow the rules or commit a crime while on parole, even after supervision has been terminated, you will be returned to prison and your parole will be revoked. Read the following rules very carefully and, if you are not willing to abide by the rules and conditions, inform the Investigator who interviews you.

STANDARD RULES AND CONDITIONS
(All parolees must follow these rules)

1. You must report to your parole officer and your employer immediately upon arrival at your destination.

2. You must obey all city, state and federal laws. You also cannot own or carry firearms or travel in a vehicle containing a firearm belonging to you or anyone else.

3. You must not leave the state to which you are paroled without the written permission of your officer, nor can

you leave the county without the consent of your officer or his/her district office.

4. You must, as directed by the parole officer, send a written report to your parole officer on the forms furnished by the officer, until your supervision is terminated. You must also report in person to your parole officer according to the schedule provided by your officer, and you must allow him/her to visit you at your home, work, or other convenient place.

5. You must immediately report in person, in writing or by telephone, any changes in your address, employment or marital status, and you must also immediately report any new arrests.

6. You cannot use or possess drugs, other than those legally prescribed by a physician. You cannot frequent or go on the premises of places where alcoholic beverages are consumed, including taverns, beer parlors, clubs, or group meetings or parties where alcoholic beverages are served.

7. You must not lie or misrepresent the truth to any member of the Pardon and Parole Board, its staff, any parole officers, or employees of their district offices, or any other official of the government.

8. You cannot associate with persons on parole or probation, or persons with criminal records, nor can you communicate with inmates of any penal institution, except members of your immediate family, unless your parole officer gives you permission because of your work or other good reason.

9. You must pay a parole fee of $20 per month to the Department of Corrections during active parole supervision, unless payment is waived due to hardship.

10. You must comply with all lawful directions issued by your supervising officer or any member of the Department of Corrections.

11. You are subject to search at any time or place, as is your vehicle and property under your control.

12. You must submit to urinalysis or any other substance abuse testing procedures as required by your parole officer.

In addition to the standard rules, special conditions of parole may be imposed by the Parole Board after it reviews your case. Special conditions are designed to meet the specific needs of the offender during parole and may include Alcoholics Anonymous, successful completion of a substance abuse program, drug counseling, psychological counseling, financial counseling, etc. Parolees may be required to parole to another state, or to remain outside the State of Oklahoma until the parole expires. Restitution may be ordered to be paid to the Department of Corrections which forwards it to the victim of the crime. Other rules and conditions may also be established by the Board. Failure to comply with the special rules and conditions of parole will also result in parole revocation.

The Board may also recommend parole to a consecutive case only or to a detainer only. Such a recommendation obligates you to complete any remaining parole period after serving your consecutive case or satisfying your detainer.

You will be informed of any special parole rules or conditions if you are recommended by the Board. The conditions will appear on the parole certificate; you must sign the certificate before you are released. You will be notified of any remaining parole obligation after completing a consecutive case or satisfying a detainer. Success or failure on parole depends upon you. Understanding and following the rules is your responsibility.

APPENDIX D

RULES AND CONDITIONS

PRE-PAROLE CONDITIONAL SUPERVISION/ ELECTRONIC MONITORING/SPECIALIZED SUPERVISION/HOUSE ARREST

1. I will report as directed to the orientation scheduled on the date, time, and place directed.

2. I will obey all city, state, and federal laws. I will not own or possess a firearm. Additionally, I will not travel in a vehicle or live in a residence containing a firearm belonging to me or anybody else. I understand that at any time or place, I am subject to search. In addition, my vehicle and any property under my control is subject to search.

3. I will not, under any circumstances, leave the state of Oklahoma. I understand that leaving the state will result in escape charges being filed against me. I must obtain permission before leaving my county of residence.

4. I will report as directed by my officer in person and in writing on the forms provided by my officer. I understand my officer will visit me at home, work, or any other place without restriction to time. I also understand that I may be required to wear an electronic security monitoring device and pay the cost for the use of this device.

5. I will not use or possess drugs other than those legally prescribed by a physician. I will not use alcohol nor go

onto the premises of places where alcoholic beverages are served, to include: beer parlors, taverns, clubs, group meetings, or parties where alcoholic beverages are served. I will submit to urinalysis or other forms of drug detection.

6. I understand that I am required to maintain full-time employment unless involved in an approved full-time educational/vocational program. If unemployed, I will be required to be actively searching for employment and provide verification of such to my officer.

7. I will pay program support fees of $20 per month payable only in cashier's check or money order to the Department of Corrections.

8. I will not apply for any public, private, or governmental assistance without prior written approval by my officer.

9. I understand that I am subject to curfew restrictions which will be determined by my officer. If requested, I will carry on my person at all times an itinerary approved by my officer in advance.

10. I will not enter into any charge accounts or credit applications for loans other than for educational expenses without approval by my officer.

11. I will comply with all lawful directives issued by my supervising officer or any member of the Department of Corrections.

12. I understand that if I cannot be located for a 24 hour period or fail to report to a Department of Corrections facility or probation and parole office, I will be considered escaped. I hereby waive all extradition rights

and agree to return to the state of Oklahoma and the Department of Corrections when directed.

13. I understand that waiving parole while on community supervision status will result in reclassification to higher security.

14. I will actively participate in the developed case plan and any subsequent amendments to the plan. Programs may include, but are not limited to:

a) Substance Abuse
b) Employment
c) Educational/ Vocational
d) Financial; i.e., court costs, restitution
e) Mental Health
f) CSSP
g) Other

15. I understand that removal from Specialized Supervision or the Electronic Monitoring Program for disciplinary reasons will prohibit any future consideration or assignment to the Specialized Supervision Program. Additionally, I understand that I cannot be considered for PPCS by the Pardon and Parole Board for 12 consecutive months after being removed from specialized supervision.

16. I will not associate with persons actively under any form of Department of Corrections supervision or with person [sic] who have a criminal record. I will not communicate with inmates or any penal institution, except members of my immediate family, unless given permission by my officer.

17. I understand that I am responsible for my own medical care and all medical expenses incurred by me upon my release to House Arrest, Pre-Parole Conditional

Supervision, the Electronic Monitoring Program, or Specialized Supervision.

18. I will promptly notify my officer of any status changes to include any contact with law enforcement and changes of residence.

19. Special conditions by the Pardon and Parole Board. ___

_____

_____

_____

_____ _____ _____

Offender/DOC No. Date Witness/Posititon

022023/FORMS DOC 022023 (R693)

APPENDIX E

Policy and Operations Manual Effective Date: 08/24/93
Probation and Parole OP-160120
Alternative to Incarceration Programs

Supervision Standards for Offenders Assigned to Alternative to Incarceration Programs

C. Medical

1. Screening

Prior to assignment to SSP/EMP, inmates will be screened by the health services unit of the sending facility. Only those inmates cleared by health services may be placed in the community. Inmates with pending medical or dental appointments will not be placed in the community until they have attended the appointments and are cleared by the medical unit, unless waived by the medical services administrator.

2. Inmate Responsibility

Once placed under community supervision, inmates will be financially responsible for all medical health care. This will include any cost incurred for emergency care.

APPENDIX F

PARDON AND PAROLE BOARD

PROCEDURE 004-11

EFFECTIVE 4/1/94

I. TITLE: Pre-Parole Conditional Supervision

II. PROCEDURE: The Executive Director will assist the Pardon and Parole Board in the consideration of inmates for pre-parole conditional supervision (PPCS) as required by law, and will issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is 92 1/2 percent or above, and will continue until 92 1/2 percent capacity is reached.

A. The Executive Director will issue criteria for PPCS consideration as directed by the Pardon and Parole Board.

1. Criteria are based upon time served and parole eligibility. Criteria will be adjusted as necessary to reduce prison population. Statutory criteria for PPCS include:

a. Minimum of 15 percent of the sentence served by time of release on PPCS

b. Within one year of initial parole consideration (regular parole docket)

c. Within 21 months of projected discharge.

2. Administrative criteria include all except the following:

a. Inmates with consecutive cases or detainers

b. Death sentences

c. Sentences of life without parole

d. Controlling case for parole violation (eligible with concurrent cases other than parole violations)

e. Returned escapees, if the scheduled PPCS docket is within one year of the date of return from escape

3. The following guidelines apply to the calculation of PPCS dockets:

a. Must have served at least 15 percent of all controlling and concurrent cases, and be within 2-13 months of the regularly scheduled docket date.

b. For indeterminate sentences, the 15 percent date will be calculated on the maximum sentence.

4. Inmates will only be considered once for PPCS. Consideration will occur prior to initial parole consideration.

5. A period of PPCS participation prior to parole may be imposed as a condition of parole if the inmate is eligible.

6. Inmates denied by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates returned from the Specialized Supervision Program are ineligible for PPCS placement for a period of one year from the date of return by state law.

8. Parole certificates will be sent to the Governor for signature at the parole docket date without further Board action. If the inmate is subject to a mandatory term, this will occur at the parole eligibility date.

9. Inmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process.

10. The Executive Director will coordinate the completion of PPCS reports.

    a. Investigators will provide reports on each inmate eligible for PPCS. Reports will comply with the requirements of Procedure 006-2.

    b. Investigators will verify the accuracy and completeness of information with the file. The

report will be forwarded to the appropriate personnel by the appropriate deadline.

c. Inmates projected to discharge within two weeks of consideration will be stricken from the docket.

d. If the inmate is ineligible for PPCS, the investigator will send a memo to the Deputy Director with a recommendation that the inmate be removed from the docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004-Docketing criteria.

B. 57 O.S. 365.

C. To provide guidelines for consideration for pre-parole conditional supervision.

(Signed) 4-6-94

JARI ASKINS, EXECUTIVE DIRECTOR — DATE

APPENDIX G

Daily Oklahoman
May 29, 1996

High Court to Decide State Preparole Case

By Chris Casteel
Washington Bureau

WASHINGTON - The U.S. Supreme Court agreed Tuesday to decide whether Oklahoma can remove a prison inmate from the state's preparole program without giving written notice and holding hearings.

The case, which will be heard in the court term that begins in October, concerns convicted murderer Ernest Eugene Harper, who was put in Oklahoma's preparole program in 1990.

Harper was denied parole in 1991, and his status in the preparole program was revoked with five hours verbal notice and without any hearings. There was no evidence that he misbehaved while out on preparole.

The 10th U.S. Circuit Court Of Appeals in Denver ruled last year that Harper's participation in the preparole program gave him a "liberty interest" that entitled him to due process before that liberty was taken away.

Oklahoma Attorney General Drew Edmondson asked the U.S. Supreme Court to hear the case, arguing that appeals courts were split on the issue of whether preparole programs were more similar to parole or to minimum-security imprisonment.

Harper contends the program is more similar to parole -- which can only be revoked after some official proceedings -- while the state argues it is more akin to imprisonment and is just a different type of confinement.

Oklahoma uses the preparole program as a way to reduce prison crowding. According to a brief filed by Edmondson's office, the only similarities between parole and preparole "are that the inmate is allowed to work outside of the correctional facility and may reside in his own home."

Inmates in the program remain in the Corrections Department's custody and are aware that they can be removed if they are denied parole or if rules and conditions are violated, the attorney general's office said.

The Oklahoma Court of Criminal Appeals and U.S. District Judge Thomas R. Brett ruled against Harper. Brett ruled that Harper didn't have a liberty interest under the U.S. Constitution or state law in remaining in the preparole program.

But the 10th Circuit Court of Appeals reversed Brett's ruling, saying the preparole program gave Harper the same procedural protections that parolees are entitled to under a 1972 high court decision, Morrissey vs. Brewer.

Under the Morrissey standard, parolees must get written notice of claimed violations, disclosure of the evidence against them, the opportunity to be heard in person and present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, and a neutral and detached hearing body such as a traditional parole board.

The 10th Circuit court said that the point where an inmate has a liberty interest protected by due process requirements comes when he's released from prison.

"The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate," the 10th Circuit court wrote.

"It is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority of guards or wardens."

Harper originally received the death penalty in 1975 for killing a Tulsa County woman and her daughter. His sentence later was modified to life in prison.

Corrections Department spokesman Jerry Massie said most preparole inmates who are turned down for full parole are allowed to remain out of prison.

"I would suspect that his crime had something to do" with Harper's removal from the program, Massie said.

Harper is at the James Crabtree Correctional Center, a medium security prison at Helena.

Generally when an inmate on preparole is denied a full parole, it is because of the governor's objection, said Terry Jenks, executive director of the state Pardon and Parole Board.

He said the board normally doesn't even vote on well-behaved preparole inmates when their regular parole hearing arrives.

"As long as the person continues to do what they're supposed to be doing, the board pretty much sends that file on to the governor without looking at it," Jenks said.

The Harper appeal prompted state authorities to stop automatically returning preparole inmates to prison when they are rejected for full parole, Jenks and Massie said.

APPENDIX H

PARDON AND PAROLE BOARD PROCEDURE

NUMBER 004-11
EFFECTIVE 9-1-89

I. TITLE: Pre-Parole Conditional Supervision (PPCS)

II. PROCEDURE: The Executive Director shall assist the Pardon and Parole Board to consider inmates for pre-parole conditional supervision as required by law and shall issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is ninety-two and one-half (92½%) percent or above and will continue until ninety-two and one-half (92½%) capacity is reached.

A. As directed by the Pardon and Parole Board, the Executive Director shall issue criteria for consideration of qualified inmates for pre-parole conditional supervision.

1. The Executive Director shall issue criteria for the selection of inmates and eligibility based on the amount of time served and the parole eligibility date. Criteria shall be periodically adjusted as needed to reduce the prison population through early release. Statutory criteria for pre-parole conditional supervision eligibility include:

a. Inmate must have served fifteen (15%) percent of sentence by time of release on PPCS.

b. Inmate must be within one (1) year of the regularly scheduled initial parole consideration.

c. Also, inmates who are within one (1) year of their projected release date.

2. Administrative criteria for pre-parole conditional supervision eligibility shall include all except the following:

a. Inmates who have consecutive cases.

b. Inmates serving death sentences.

c. Inmates serving life without parole.

d. Inmates scheduled for commutation consideration.

e. Inmates serving a parole violation.

f. Inmates who are escapees on annual dockets.

3. The following guidelines shall apply to the calculation of pre-parole conditional supervision dockets:

a. Inmates must have served 15% of their time and be within thirteen (13) months of their regularly scheduled docket date.

b. For those inmates who are serving indeterminate sentences, the fifteen (15%) percent shall be calculated on the maximum rather than the minimum sentence.

4. Inmates eligible for this program shall only be considered once prior to parole consideration.

5. At an inmate's regularly scheduled docket it may be recommended that the inmate participate in the PPCS program prior to parole.

6. Inmates who are not recommended by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates who are placed on PPCS and successfully completes [sic] six (6) months will automatically be recommended for parole to the Governor at that time, or if serving a mandatory term will be recommended at that time.

8. The Executive Director shall coordinate the responsibilities of investigators for the preparation of pre-parole

conditional supervision reports with the parole coordinator for the Department of Corrections.

a. The investigators will provide a report for each inmate eligible for pre-parole conditional supervision. The pre-parole report shall follow the definitions for investigative reports as defined in Procedure 006-2 and shall include:

(1) Docket month and year

(2) Parole docket date/reason

(3) Inmate's facility (abbreviation)

(4) Name of person preparing the form

(5) Date prepared

(6) Inmate's name

(7) DOC number

(8) Date of birth/age

(9) Sex

(10) Controlling offense

(11) Sentence length

(12) County of conviction

(13) Felony case number

(14) Reception/rebill date

(15) Jail time

(16) Offense history

(17) Current release date

(18) Projected release date

(19) Number of prior incarcerations

(20) Security level

(21) Concurrent and/or consecutive cases or detainers

(22) Chronology of other felony convictions

(23) Official version of offense as indicated by a documented source

(24) Inmate's version of instant offense

(25) Institutional assignments and transfers

(26) Institutional disciplinary record

(27) Institutional participation program

(28) Institutional work performance

(29) Pre-parole plan

(30) Evaluation of previous adult community supervision and deferred sentences

(31) Juvenile institutionalization/supervision

(32) Substance abuse and mental health history and treatment

(33) Evaluation of disciplinary record

(34) Personal and family information

(35) Miscellaneous

(36) Recommendation

(37) Rationale and documentation or relevant comments supporting the recommendation, and any program stipulations. (Stipulated programs to be completed prior to or following release.)

b. Investigators shall verify the accuracy and completeness of information with the file. The report shall be forwarded to the appropriate personnel as required by the deadline schedule.

c. If the inmate is found to be ineligible for pre-parole, the investigator shall send a memo to the Deputy Director with a recommendation that said inmate be removed from the PPCS docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004 - Establishment of docketing criteria for consideration of paroles, pre-parole conditional supervision, sentence commutations, leaves of absence and pardons.

B. To ensure compliance with 57 O.S. Supplement 1988 § 577 requiring pre-parole conditional supervision.

C. To provide guidelines for considering pre-parole conditional supervision to reduce prison crowding.

DATE APPROVED: 9-1-89

(signed)
RAY H. PAGE,
EXECUTIVE DIRECTOR

APPENDIX I

Policy and Operations Manual — Effective Date: 10/29/92
Classification and Case Management — OP-060208
Pre-Parole Revocation Procedures

Interim Pre-Parole Conditional Supervision Revocation Procedu

The pre-parole conditional supervision revocation process consists of two parts. The first part determines whether or not probable cause exists. If probable cause is determined to exist, the second part consists of the PPCS Revocation Hearing and/or review and decision by the PPCS revocation review officer.

I. Initiating Procedures

A. Violation of Rules and Conditions

In the event the supervising officer detects a violation and further deems the pre-parole conditional supervision (PPCS) offender a threat to the community or an escape risk, with the approval of the district supervisor, the officer will apprehend and detain the offender, and the revocation process will be initiated. Normally, a violation report will be submitted to the district supervisor prior to the apprehension of the offender. Anytime an offender is arrested on felony charges or escapes, a copy of the Serious Incident/Media Attention Information Sheet (DOC

APPENDIX I

Form 050005 Attached) will be sent to the Parole Process Coordinator. Each district will ensure an impartial hearing officer is assigned to the case. Senior probation and parole officers, senior case managers, probation and parole team supervisors, assistant district supervisors, and case manager supervisors may be designated as hearing officers.

B. Supervising Officer Responsibilities

1. The supervising officer will submit court documents such as a certified district attorney's information sheet and a certified Judgement and Sentence indicating a crime occurred subsequent to the date of pre-parole placement (when that is the only allegation) to the hearing officer attached to a Pre-Parole Conditional Supervision Notice of Finding of Probable Cause (DOC Form 024071). This will constitute prima facie evidence that a violation of PPCS has occurred. A violation of city, state, or federal law will be documented as to date the offense occurred and a resulting conviction.

2. A hearing officer, finding probable cause, will sign and date the Pre-Parole Conditional

APPENDIX I

Supervision Notice of Finding of Probable Cause (DOC Form 024071) and return to the supervising officer for delivery to the offender.

3. The supervising officer will prepare a PPCS Notice of Probable Cause Hearing (DOC Form 022024 Attached) when any technical violations are alleged.

4. PPCS Notice of Finding of Probable Cause (DOC Form 024071), Notice of PPCS Revocation Hearing (DOC Form 022025), and PPCS Notice of Probable Cause Hearing (DOC Form 022024) will be completed as follows by the supervising officer:

   a. Offender's full name and DOC number as it appears on the offender's Consolidated Record Card.

   b. All case numbers and county of conviction subject to revocation will be entered.

   c. Allegations: Specify the rule number (as appears on the rules and conditions of house arrest/pre-parole conditional supervision) and

APPENDIX I

how the offender allegedly violated such condition of PPCS. Be specific in describing what resulted in the rule violation(s), include dates, case numbers, amounts of monies owed, and other evidence to be presented on PPCS notices of probable cause hearing.

5. The supervising officer will prepare all hearing notices and ensure any related documents such as information sheet(s) and Judgement and Sentence(s) are attached. Three sets of notices will be prepared and reviewed by the officer's immediate supervisor and/or the assistant district supervisor, prior to service to the offender.

6. The Notice of Finding of Probable Cause (DOC Form 024071) or Notice of Probable Cause Hearing (DOC Form 022024) will be delivered and Probable Cause Hearing will be completed if required within 48 hours of apprehension excluding weekends and holidays. The hearing will not be held less than 24 hours following notification to the offender. The hearing will be held in or near the community where the violation is alleged to have occurred or where the offender has been taken into custody.

APPENDIX I

7. The Notice of PPCS Revocation Hearing (DOC Form 022025), will be prepared by the supervising officer for delivery to the offender in conjunction with the PPCS Notice of Finding of Probable Cause (DOC Form 024071) or PPCS Notice of Probable Cause Hearing (DOC Form 122024). This notice will be served in the event that a PPCS Finding of Probable Cause (DOC Form 022024) has been made or in the event the offender waives the probable cause hearing. If the offender desires a Probable Cause Hearing, the Notice of Pre-Parole Conditional Supervision Revocation Hearing (DOC Form 022025) will be reserved for service at the conclusion of the Probable Cause Hearing.

8. Three sets of notices will be delivered, signed, witnessed, and dated. The officer delivering the notice will read the notices to the offender and will allow the offender to ask questions if necessary. Any waiver will be done only after it is evident that the offender understands the consequences of such an act (as explained on the documents). If the offender is illiterate, the notices and any attachments will be explained before the offender makes a decision. If the offender does not

APPENDIX I

understand English, the notices and any attachments will be interpreted into a language the offender understands. The officer will not make a recommendation to the offender as to whether or not to waive one or both hearings, or make any statement which could later be construed as an inducement to waive.

9. One set of hearing notices will be given to the offender, one to the hearing officer (if necessary), and one set is placed in the field file. All certified documents relating to the allegations of PPCS violation will be retained with the set of notices that are placed in the field file. The offender will be advised of the two part hearing process. At the Probable Cause Hearing, evidence concerning whether or not probable cause to believe a violation has occurred will be considered. The Pre-Parole Conditional Supervision Revocation Hearing is held only if probable cause has been found that there has been a violation of PPCS. The PPCS Revocation Hearing may result in finding that a violation occurred and a recommendation to the PPCS Revocation Review Officer for or against PPCS revocation.

APPENDIX I

Mitigation may be considered during the PPCS Revocation Hearing.

10. The offender will be advised of:

a. The offender will be allowed to retain private attorney, request staff representative, or any other approved persons. Representation participation may include (but will not be limited to) cross-examination of witnesses, examination/presentation of evidence, procedural objections, and/or speaking on behalf of offender.

b. The right to know allegations (this limits evidence to those specific allegations listed on the PPCS Notice of Probable Cause Hearing) (DOC Form 022024).

c. The right to confront adverse witnesses (this will require presence of all adverse witnesses as to technical violations in addition to police reports or violation reports).

APPENDIX I

II. Pre-Hearing Procedures

A. One of the primary purposes of providing the offender with the right to a hearing is to afford the offender an opportunity to confront and cross examine accusers. As set forth by Morrisey v. Brewer, it was established that this right existed unless the hearing officer finds "good cause" for not requiring the presence of the adverse witness. This decision required that any person who has given adverse information upon which the parole revocation is to be based will be made available for questioning in the presence of the offender, if so requested. The offender will be allowed to confront the adverse witness unless the hearing officer determines that there are substantial and compelling circumstances providing good cause for denying the request i.e., a witness could be subjected to risk of harm if identity is disclosed. (Such circumstances will be documented as part of the Probable Cause Hearing Report.)

1. The offender may retain private counsel or request a staff representative.

2. The hearing officer will decide whether or not to assign the offender a staff representative in order

APPENDIX I

Policy and Operations Manual Effective Date: 10/29/92
Classification and Case Management OP-060208
Pre-Parole Revocation Procedures

to assist the offender in defense of the allegations. The staff representative will be appointed where, in the opinion of the hearing officer, there is an inability for the offender to gather evidence, where the offender is incapable of making a defense, or where an interpreter is required. The hearing officer may allow the offender additional time for hearing preparation.

3. The staff representative will:

   a. consult with the offender before the hearing.

   b. explain the charge against the offender and the potential consequences.

   c. explain the ramification of a guilty plea.

   d. may assist the offender in investigating and presenting evidence in the offender's behalf.

   e. may represent the offender at the hearing.

   f. may question all witnesses, except confidential witnesses.

APPENDIX I

4. If the offender chooses to cancel the assistance of the staff representative, formal written waiver of staff assistance is required. If, in the judgement of the hearing officer and/or district supervisor, the offender is unable to knowingly and intelligently waive such assistance, the hearing officer and/or district supervisor will ensure that a staff representative is provided.

B. Evidence presented is not restricted to rules of evidence as in a courtroom situation. Weight and credence given to evidence or testimony presented is left to the hearing officer's judgement, but the reasons relied on for acceptance or rejection will be clearly stated.

C. The hearing officer will take all reasonable steps to preserve the confidentiality of the information by separating it from the rest of the record and clearly marking it confidential. The offender will be notified if confidential information is considered, and also whether the information was relied on in making the decision.

D. If the hearing officer determines that the identity of a witness may subject the witness to risk of harm, the

APPENDIX I

witness need not be subjected to confrontation and cross-examination. The risk of harm may be demonstrated by an overt or covert threat to the witness, by implicit threats or by any circumstances which create a reasonable likelihood that harm would result. The hearing officer will inquire into facts and circumstances, document them, and make a specific finding in the record. If any part of this inquiry is done during the course of the hearing, with the offender and/or the offender's staff representative, extreme care must be taken by the hearing officer to avoid accidental or unwitting disclosure of the witness' identity.

E. Once the risk of harm has been documented, the hearing officer should adequately document the information to be provided by the witness, and should be satisfied with the reliability of the information. Because of the lack of confrontation and cross-examination by the offender, the hearing officer will be especially careful to scrutinize the evidence supplied by the witness. The best method is by a personal examination of the witness; alternatives are by an affidavit, statement signed by the witness, tape recording, or a witness present at the hearing who actually interviewed the confidential witness. The

APPENDIX I

more diluted the statements of the witness become, the less reliable the testimony and the more acute the lack of confrontation and cross-examination becomes.

F. At any time during this process, the PPCS Probable Cause Hearing or the PPCS Revocation Hearing may be delayed or postponed for good cause as deemed appropriate by the district supervisor and/or hearing officer. The offender will be notified in writing of the reason for delay.

G. The supervising officer will ensure security is maintained throughout the hearing. The supervising officer will ensure that the offender is restrained per policy and transported to and from the hearing room.

H. After all interested parties are present and security is preserved, the hearing officer will begin the hearing.

III. Conducting The PPCS Probable Cause Hearing

A. The hearing will be recorded in its entirety and the hearing officer will protect the record. Individuals will be admitted to the hearing based upon their contribution regarding the allegations. The hearing officer will ensure that each witness, prior to giving

APPENDIX I

testimony, states the name and relationship to the offender.

1. Begin taping

2. State offender's name, DOC #, case #(s), county, date, time, and place of hearing.

3. Identify hearing officer, offender, supervising officer, and all other parties present (attorneys, witnesses, security, observers, etc.).

"This proceeding is an administrative rather than a judicial function. The Probable Cause Hearing is part one of a two-part process as prescribed by the United States Supreme Court's decision in Morrisey v. Brewer (408 U.S. 4710) [sic]. As hearing officer, it is my responsibility to offer, as a result of the information supplied in the course of this hearing, a finding as to whether there is probable cause to believe the offender has committed a PPCS violation. I do not represent final authority. The PPCS revocation hearing officer will recommend, and the PPCS revocation review officer is the final authority in revoking PPCS."

APPENDIX I

"As set forth in Morrisey v. Brewer, and on this _____ day of _____, 19__, the state Oklahoma has scheduled this PPCS probable cause hearing to be conducted at _____ in _____ County, Oklahoma. Subject of this hearing is _____, # _____, whose PPCS was granted on the ____ day of _____, 19__ by the Director of the Department of Corrections after recommendation of the Pardon and Parole Board.

4. Officer Presents Offender's PPCS Rules and Conditions

"This signed document is evidence of this PPCS as agreement to the Rules and Conditions of PPCS contained therein. _____, #_____, please describe for the record this PPCS Rules Conditions, and acknowledge that your signature is true and correct."

a. If the offender REFUSES TO ACKNOWLEDGE SIGNATURE AND DOCUMENT, so indicate for the record and make a ruling as to the authenticity.

APPENDIX I

b. If offender ACKNOWLEDGES, state for the record "The PPCS Rules and Conditions document and signature thereon is ruled authentic."

5. The hearing officer states purpose of the hearing.

"The purpose of this hearing is to determine, by means of the information presented, if whether or not cause exists to believe that this offender violated the Rules and Conditions of PPCS."

6. Supervising Officer Submits PPCS Notification of Probable Cause Hearing (DOC Form 022024) to Hearing Officer at This Time

"Received at this time is a copy of the PPCS Notice of Probable Cause Hearing (DOC Form 022024) which informed the offender of the date, location and purpose of this hearing which was signed by the offender on the ____ day of _____, 19__, and witnessed."

"The alleged violations are as follows."

APPENDIX I

7. Read the allegations and note the offender's admission or denial of each allegation.

8. Read MIRANDA when questioning offender regarding any pending charges.

9. IF WITNESSES plan to testify, ask the following of each:

   a. "Name"

   b. "Relationship to offender/official position"

   c. "Did you hear the allegation as read aloud?"

10. "What does the state of Oklahoma have to present at this hearing to support the allegations?"

11. The supervising officer will answer: "I submit violation report dated _____ and supplementals and dates supported by the following evidence/testimony." Supervising officer will list and present physical/verbal testimony. All documents will be entered into evidence. Offender will be allowed to discredit

APPENDIX I

allegations and confront witnesses (if it will not put the witnesses in any danger). Each allegation will be reviewed separately . . . asking the offender to admit or deny each allegation.

12. Both the state and the offender will be allowed to present all evidence, witnesses, and cross-examine with regard to each allegation.

13. The hearing officer may ask questions for clarification and will encourage the offender to speak in self-defense, cross-examine witnesses, and review evidence.

14. After all evidence and testimony has been presented, call a SHORT RECESS. TURN OFF THE TAPE.

15. The hearing officer's obligation will be to make a determination regarding the Violation of Rules and Conditions of PPCS.

16. Complete PPCS Probable Cause Hearing Findings (DOC Form 024070), make two copies, original to offender. List allegations by

APPENDIX I

rule number and evidence relied on to support or disprove.

B. If probable cause exists, the hearing officer completes Probable Cause Hearing Findings (DOC Form 024070), reads the findings into the record, and give the original to the offender.

1. Begin taping

2. If probable cause does not exist, "Probable cause does not exist based on the evidence/testimony presented to me in this hearing. My recommendation will be forwarded to the district supervisor for further action. Your release is controlled by that authority."

3. If probable cause exists, the following explanation will be provided to the offender:

"You are entitled to an PPCS Revocation Hearing to determine (1) whether you have in fact violated the rules and conditions of PPCS and (2) whether your PPCS status will be revoked. The purpose of this hearing is to examine evidence, presented by the Department

APPENDIX I

of Corrections, that you have violated rules/conditions of PPCS. You have the right to representation, by your attorney, staff representative, or any other person. It is your responsibility to notify your witness of the date, time, and place of the hearing."

4. Issue Offender Notice of PPCS Revocation Hearing (DOC Form 022025) provided by supervising officer, requesting the offender indicate by check and initials whether or not the offender wants a PPCS Revocation Hearing or wishes to waive the hearing. The revocation hearing will not be held less than 48 hours following the finding of probable cause, excluding weekends and holidays. If the offender waives the 48-hour preparation time, the PPCS Revocation Hearing will be held immediately following the PPCS Probable Cause Hearing. Have the offender and witnesses sign and date the notices. The offender gets the original and two copies are returned to the supervising officer for distribution.

5. Terminate hearing--Turn off tape

APPENDIX I

IV. PPCS Revocation Hearing

A. The hearing will be recorded in its entirety and the hearing officer will protect the record. Individuals will be admitted to the hearing based upon their contribution regarding the allegations. The hearing officer will ensure that each witness, prior to giving testimony, states the name and relationship to the offender.

1. Begin taping

2. State offender's name, DOC #, cases #(s), county, date, time, and place of hearing.

3. Identify hearing officer, offender, supervising officer, and all other parties present (attorneys, witnesses, security, observers, etc.)

4. "This proceeding is an administrative rather than a judicial function. The Pre-Parole Conditional Supervision Revocation Hearing is part two of a two-part process as prescribed by the United States Supreme Court's decision in Morrisey v. Brewer (408 U.S. 4710). As hearing officer, it is my responsibility to review

APPENDIX I

evidence, testimony, and mitigating circumstances supplied in the course of this hearing regarding the alleged rule violations and to make a recommendation for or against revocation. I do not represent final authority. The PPCS Revocation Review Officer is the final authority for revoking PPCS."

5. "As set forth in Morrisey v. Brewer, and on this ____ day of _____, 19___, the state of Oklahoma has scheduled this PPCS Revocation Hearing to be conducted at _____ in _____ County, Oklahoma. Subject of this hearing is _____, #_____, whose Pre-Parole Conditional Supervision was granted on the _____ day of _____, 19____, by the director of the Department of Corrections after recommendation by the Pardon and Parole Board.

6. Officer Presents Offender's PPCS Rules and Conditions.

APPENDIX I

"This signed document is evidence of an agreement to the Rules and Conditions of PPCS contained therein. _____, #_____, please describe for the record, and acknowledge, these, your PPCS Rules and Conditions signature is true and correct."

a. If the offender REFUSES TO ACKNOWLEDGE SIGNATURE AND DOCUMENT, so indicate for the record and make a ruling as to the authenticity.

b. If offender ACKNOWLEDGES, STATE FOR THE RECORD, "The PPCS Rules and Conditions Document and signature thereon is ruled authentic."

7. "The purpose of this hearing is to determine by means of the information presented whether or not this offender violates the rules and conditions of PPCS taking into account mitigating circumstances. Following this hearing, a recommendation for or against revocation will be forwarded to the PPCS Revocation Review Officer.

APPENDIX I

8. Supervising Officer Submits Notice of PPCS Revocation Hearing (DOC Form 022925) to Hearing Officer at This Time

"Reviewed at this time is a copy of the Notification of PPCS Revocation Hearing which informed the offender of the date, location and purpose of this hearing which was signed by the offender on the __ day of _____, 19____, and witnessed."

"The alleged violations are as follows."

9. Read the allegations and note the offender's admission or denial of each allegation.

10. Read MIRANDA when questioning offender regarding any pending charges.

11. IF WITNESSES plan to testify, ask the following of each:

a. "Name"

b. "Relationship to offender/official position"

APPENDIX I

c. "Did you hear the allegation as read aloud?"

12. "What does the state of Oklahoma have to present at this hearing to support these allegations?"

13. The supervising officer will answer: "I submit violation report dated, _____ supplementals dated _____, and supported by the following evidence/testimony." Supervision officer will list and present physical/verbal testimony. All documents will be entered into evidence. Offender will be allowed to discredit allegations and confront witnesses (if it will not put the witnesses in any danger). Each allegation will be reviewed separately . . . asking the offender to admit or deny each allegation.

14. Both the state and the offender will be allowed to present all evidence, witnesses, and cross-examine with regard to each allegation.

15. The hearing officer may ask questions for clarification and will encourage the offender to

APPENDIX I

speak in self-defense, cross-examine witnesses, and review evidence.

16. "This PPCS Revocation Hearing is now complete. The evidence presented and all mitigating circumstances will be reviewed and a report detailing the findings along with recommendation either for or against revocation will be prepared by this hearing officer. This report and the evidence will be forwarded to the PPCS Revocation Review Officer for a final decision. A copy of the report will be forwarded to you at the facility where you are housed. You will be notified of the results of the hearing by the PPCS Revocation Review Officer as soon as available. If the decision is to revoke, the review officer will also inform you of the appeals process. An appeal cannot be filed until the final decision of the review officer."

V. Post Hearing Procedures

A. The PPCS Revocation hearing officer will compose summary as follows:

APPENDIX I

1. First paragraph--the date, approximate time of hearing, date, date offender notified of hearing. State if waiver of 48 hours was requested.

2. Second paragraph--names of witnesses and titles who appeared in behalf of pre-paroles.

3. Third paragraph--names of witnesses and tiles [sic] who appeared in behalf of state.

4. Fourth paragraph--opening of the hearing stating that offender acknowledged signature on the PPCS Rules and Conditions.

5. Paraphrase testimony of witnesses and describe any physical evidence of documents presented.

6. Closing paragraph--each allegation will be addressed separately as to whether or not a violation of PPCS has occurred and the reason(s) for such finding(s) should be clearly stated. This paragraph will include a recommendation for or against revocation of the offender's PPCS status.

APPENDIX I

Policy and Operations Manual Effective Date: 10/29/92
Classification and Case Management OP-060208
Pre-Parole Revocation Procedures

B. The probable cause and revocation hearing officers will identify cassette tapes for each hearing as follows:

   1. Offender name and number

   2. Date of hearing

   3. Location of hearing

C. The revocation hearing officer will submit tapes, documents, and evidence submitted for both hearings, and a revocation hearing summary to the district supervisor for review. The district supervisor will forward the material to the PPCS Revocation Review officer within five working days of the hearing. All evidence will be retained for 90 days after a decision is made by the PPCS Revocation Review Officer.

D. The district will ascertain the offender's status with regard to pending charges in order to notify proper authorities of availability to transport.

APPENDIX I

VI. PPCS Revocation Hearing File

A. The district supervisor will ensure the following components are completed and included in the PPCS Revocation Hearing file:

1. File will be labeled PPCS Revocation Hearing File, including offender's full name and DOC number.

2. Hearing notices

3. Hearing summary (if applicable)

4. All certified court documents and notarized affidavits introduced at the hearing

5. Copy of Probable Cause Hearing Findings (DOC Form 024070)

6. Copy of rules and conditions of PPCS

7. Violation report (and supplemental reports)

8. One year of chronologicals

APPENDIX I

9. Last assessment/reassessment

B. The PPCS Revocation Review Officer will ensure that the offender is notified of the hearing results.

VII. Duties of the PPCS Revocation Review Officer

A PPCS Revocation Review officer will be designated by each regional director. The review officer is the final decision maker in PPCS revocations and will ensure due process is followed in the revocation process as outlined in Morrisey v. Brewer.

A. Review the PPCS Revocation File, all documented evidence and the hearing tape to ensure due process has been followed and make a final determination for or against revocation.

B. The review officer may order a rehearing or order the release of the offender back to PPCS in cases where due process requirements were not properly met.

C. Notify the offender of the final decision. The offender will also be notified of the appeals process available through the courts.

APPENDIX I

D. Notify the Parole Process Coordinator of the results of the hearing by forwarding the hearing summary and final decision.

E. PPCS Revocation Review Officer's decision is final.

F. If the PPCS Revocation Review Officer's decision is against revocation, the Out-Count Unit will be notified for return of the offender to PPCS.

VIII. References

Morrisey [sic] v. Brewer 408 U.S. 4710 57 O.S. § 365

IX. Action

The regional director will be responsible for compliance with these procedures.

The deputy director, Offender Services, will be responsible for the annual review and revisions.

Any exceptions to this operations memorandum will require written approval from the director.

These procedures will be effective immediately after signing.

APPENDIX I

Distribution: Policy and Operations Manual

(signed) 10-29-92
Larry A. Fields, Director
Oklahoma Department of Corrections

OP060208/OPSSIGN/OPS060

PRE-PAROLE CONDITIONAL SUPERVISION
NOTICE OF FINDING OF PROBABLE CAUSE

Inmate _____ Number _____

Date Paroled _____ Discharge Date _____

Department of Corrections records indicate that you have been convicted of the following offense(s) during Pre-Parole Conditional Supervision during the term of PPCS on CRF-_____

OFFENSE	CASE NO.	JURISDICTION	DATE COMMITTED	DATE OF CONVICTION	SENTENCE

After Administrative review of PPCS violation reports, certified copies of information sheets, and certified copies of Judgment and Sentence documents pertaining to the above conviction(s), it has been determined that there is probable cause to believe that you have violated the following rules and conditions of PPCS:

RULE NO.	ALLEGED VIOLATION

You are therefore entitled to a PPCS Revocation Hearing to determine (1) whether you have in fact violated the rules and conditions of PPCS and (2) whether your PPCS should be revoked. You will be notified in writing of the date, time, and place of such hearing.

_____
Signature

_____
Title

_____
Date

_____ Signature of Inmate	_____ Number	_____ Date
_____ Signature of Witness	_____ Number	_____ Date
_____ Signature of Witness	_____ Number	_____ Date

DOC 024071 (10/92)

APPENDIX J

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES
PAROLE FUND AND RELATED MATTERS

Okla. Stat. tit. 57, § 365 (1995)

§365. Preparole Conditional Supervision Program

A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of this title, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2 %) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of this title, shall be eligible to participate in this program;

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within twenty-one (21) months of his projected release date, prior to being eligible for this program; and

3. Only inmates who have attained the proficiency level established by Section 3 of this act, unless exempted by said section, or who comply with education requirements as provided in subsection C of Section 4 of this act shall be eligible for participation in this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of

the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

G. Any inmate who fails to satisfactorily attend and make satisfactory progress in the educational program in which the inmate has been required to participate as a condition of eligibility for this program shall have his or her eligibility for this program revoked. Any such inmate shall be returned to confinement in the custody of the Department of Corrections.

APPENDIX K

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 332.7 (1995)

§ 332.7. Persons eligible for consideration for parole--Inquiry--Recommendation to Governor--Parole consideration date

A. Upon completion of one-third (1/3) of the sentence of any person in the custody of the Department of Corrections, such person shall be eligible for consideration for a parole, and it shall be the duty of the Pardon and Parole Board to cause an examination to be made at the penal institution where the person is assigned, and to make inquiry into the conduct and the record of the said person during his custody in the Department of Corrections, which shall be considered as a basis for consideration of said person for recommendation to the Governor for parole. However, the Pardon and Parole Board shall not be required to consider for parole any person who has completed one-third (1/3) of his sentence if the person has participated in a riot or in the taking of hostages, or has been placed on escape status, while in the custody of the Department of Corrections. The Pardon and Parole Board shall adopt policies and procedures governing parole consideration for such persons.

B. The Pardon and Parole Board shall not recommend to the Governor any person who has been convicted of three or more felonies arising out of separate and distinct

transactions, with three or more incarcerations for such felonies, unless such person shall have served the lesser of at least one-third (1/3) of the sentence imposed, or ten (10) years; provided that whenever the population of the prison system exceeds ninety-five percent (95%) of the capacity as certified by the State Board of Corrections, the Pardon and Parole Board may, at its discretion, recommend to the Governor for parole any person who is incarcerated for a nonviolent offense not involving injury to a person and who is within six (6) months of his or her statutory parole eligibility date.

C. Upon application of any person convicted and sentenced by a court of this state and relinquished to the custody of another state or federal authorities pursuant to Section 61.2 of Title 21 of the Oklahoma Statutes, the Pardon and Parole Board may determine a parole consideration date consistent with the provisions of this section and criteria established by the Pardon and Parole Board.

D. No person who is appearing out of the normal processing procedure shall be eligible for consideration for parole without the concurrence of at least three (3) members of the Pardon and Parole Board.

APPENDIX L

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 332.8 (1995)

§ 332.8. Conditions for parole -- Employment and residence assistance

No recommendations to the Governor for parole shall be made in relation to any inmate in a penal institution in the State of Oklahoma unless the Pardon and Parole Board considers the victim impact statements if presented to the jury, or the judge in the event a jury was waived, at the time of sentencing and, in every appropriate case, as a condition of parole, monetary restitution of economic loss as defined by Section 991f of Title 22 of the Oklahoma Statutes, incurred by a victim of the crime for which the inmate was imprisoned. In every case, the Pardon and Parole Board shall first consider the number of previous felony convictions and the type of criminal violations leading to any such felony convictions, then shall consider either suitable employment or a suitable residence, and finally shall mandate participation in education programs to achieve the proficiency level established in Section 510.7 of this title or, at the discretion of the Board require the attainment of a general education diploma, as a condition for release on parole. The probation and parole officer shall render every reasonable assistance to any person making application for parole, in helping to obtain suitable employment or enrollment in an education program or a suitable residence. Any inmate who fails to satisfactorily attend and make satisfactory progress in the educational

program in which the inmate has been required to participate as a condition of eligibility for parole, shall have his or her eligibility for parole revoked. Any such inmate shall be returned to confinement in the custody of the Department of Corrections.

APPENDIX M

OKLAHOMA STATUTE
TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 350

§ 350. Deduction from sentence of time spent on parole--Revocation of parole

A. Every person, hereinafter referred to as "convict," who has been or who in the future may be sentenced to imprisonment in any state penal institution shall, in addition to any other deductions provided for by law, be entitled to a deduction from his sentence for all time during which he has been or may be on parole. The provisions of this section are hereby declared to be both retroactive and prospective, and to apply to convicts who are on parole on the effective date of this act as well as to convicts who may be paroled thereafter; and shall at the discretion of the paroling authority apply to time on a parole which has been or shall be revoked.

B. Beginning November 1, 1987, the paroling authority also shall have the discretion to revoke all or any portion of the parole.

APPENDIX N

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 8. OKLAHOMA CORRECTIONS ACT OF 1967

Okla. Stat. tit. 57, § 512 (1995)

§ 512. Supervision of inmates paroled from state institutions -- Conditions for release -- Violations

Any inmate in a state penal institution who has been granted a parole shall be released from the institution upon the following conditions:

1. That he comply with specified requirements of the Division of Community Services of the Department of Corrections under the active supervision of a Probation and Parole Officer. Such active supervision shall be for a period not to exceed three (3) years, except as provided in paragraph 2 of this section.

2. That he be actively supervised by a Probation and Parole Officer for an extended period not to exceed the expiration of the maximum term or terms for which he was sentenced if convicted of a sex offense or upon the determination by the Division of Community Services that the best interests of the public and the parolee will be served by such an extended period of supervision.

Provided, for the purposes of this section, the term "sex offense" shall not include a violation of

paragraph 1 of subsection A of Section 1021 of Title 21 of the Oklahoma Statutes.

The Probation and Parole Officer, upon information sufficient to give him reasonable grounds to believe that the parolee has violated the terms of and conditions of his parole, shall notify the Deputy Director of the Division of Community Services in accordance with Section 516 of Title 57 of the Oklahoma Statutes.